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7/28 81
REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

SUBMITTED AT THE FEBRUARY TERM, 1893, OF THE FOURTH DISTRICT
AND AT THE MARCH AND OCTOBER TERMS, 1893,
OF THE FIRST DISTRICT.

VOL. LI.

REPORTED BY
MARTIN L. NEWELL
OF THE SPRINGFIELD BAR

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THE APPELLATE COURTS OF ILLINOIS

The Appellate Courts are held by three Judges of the Circuit Courts in each of the four districts. They are assigned by the Supreme Court for a term of three years. One Clerk of the Appellate Court is elected in each district for a term of six years.

MARTIN L. NEWELL, Reporter, Springfield, Sangamon county.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago, Cook county.

TERMS—First Tuesdays in March and October.

CLERK—Thomas G. McElligott, Ashland Block, Chicago, Illinois.

JUSTICES.

JOSEPH E. GARY, Ashland Block, Chicago.

ARBA N. WATERMAN, Ashland Block, Chicago.

HENRY M. SHEPARD, Ashland Block, Chicago.

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, LaSalle county.

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TABLE OF CASES

A

A. B. Dick Company v. Sherwood Letter File Company.....	343
Abbott, Nappin v.....	615
Adair v. Adair.....	301
Allen, Arcade Company v.....	305
American Preservers Co., Bishop v.....	417
American Trust & Sav. Bk., Geuder & Paescheke Mfg. Co. v.....	349
Ancient Order of United Workmen v. Holdom.....	200
Anderson, Schillo v.....	408
Arcade Company v. Allen.....	305
Armstead v. Blickman.....	470
Armstrong v. Crilly.....	504
Atchison, T. & S. F. R. R. Co. v. Goetz & Brada Manfg. Co.....	151
Attorney-General v. Newberry Library.....	166

B

Barnes v. Ludington.....	90
Barker v. Turnbull.....	226
Barzynski v. Stolba.....	388
Bayor v. Estate of Schaffner & Co.....	180
Beldam v. Lewisohn.....	47
Berkson v. The People.....	103
Binder, West Chicago Street R. R. Co. v.....	420
Bishop v. American Preservers Co.....	417
Blake, Standard Fashion Co. v.....	233
Blickman, Armstead v.....	470
Block, Gilbert v.....	516
Boddie v. Tudor Boiler Mfg. Co.....	302
Bode, West Chicago Street Railroad Co. v.....	440
Bolton v. Huling.....	591
Bonney & Bonney v. Ketcham.....	321
Bonney v. Weir & Craig Mfg. Co.....	380
Booth v. Koehler.....	370
Brabrook Tailoring Co., Peterson v.....	249
Brady v. The People.....	112
Brennan, World's Columbian Exposition Co. v.....	128
Brown, Johnson v.....	549

Brown v. Lobdell, Farwell & Co.....	574
Brown v. McKay.....	295
Brown v. Monson.....	488
Brown, Wabash Railroad Co. v.....	656
Bucklen v. Hasterlik.....	132
Buhl v. Noe.....	622
Bunker, Columbian Light, Heat & Power Co. v.....	258
Burdette, Hooven, Owens & Reutschler Co. v.....	115
Burns, City of Springfield v.....	595
Buxbaum & Co. v. Dunham.....	240

C

Calumet Furniture Co. v. Reinhold.....	328
Canniff, Commercial National Bank v.....	579
Carey-Lombard Lumber Co. v. Chicago Title & Trust Co.....	239
Carroll-Potter Boiler & Tank Co. v. Wheeling Corrugating Co....	163
Carson, Louisville, N. A. & C. Ry. Co. v.....	552
Chicago Anderson Pressed Brick Co. v. Rembarz.....	542
Chicago City Rail Road Co., Doane v.....	351
Chicago Consolidated Bottling Co. v. McGinnis.....	325
Chicago, M. & St. P. Ry. Co. v. Walsh.....	584
Chicago Title & Trust Co., Carey-Lombard Lumber Co. v.....	239
Chicago, R. I. & P. Ry. Co., Cludleigh v.....	491
Chicago & W. I. R. R. Co. v. DeMarko.....	581
City of Springfield v. Burns.....	595
Clark, Springfield City Ry. Co. v.....	626
Clarke, Doremus v.....	435
Clough v. Kyne.....	120
Cludleigh v. C., R. I. & P. Ry. Co.,.....	491
Coe, McCauley v.....	284
Columbian Hardwood Lumber Co. v. Langley.....	100
Columbian Light, Heat & Power Co. v. Bunker.....	258
Commercial National Bank v. Canniff.....	579
Consolidated Coal Co., Overman & Cook v.....	289
Conwell, Paul v.....	582
Conyne Stone Co. v. Jones.....	17
Cook v. Haussen.....	269
Cook, Sanitary District of Chicago v.....	424
Cors v. Tompkins.....	315
County of Cook v. Ryan.....	190
Crilly, Armstrong v.....	504
Cronholm, Magnusson v.....	478

D

Dale v. Davis.....	328
Davis, Dale v.....	328
Dawson, George H. Hess Co. v.....	146
DeMarko, Chicago & W. I. R. R. Co. v.....	581
Dewey, Peabody v.....	260

Dick v. Marble.....	351
Doane v. Chicago City Railroad Co.....	353
Dobson, Gager v.....	542
Doremus v. Clarke.....	425
Dunderdale v. Westinghouse Electric Co.....	407
Dunham, Buxbaum & Co. v.....	240

E

Elder v. Whittemore.....	662
Eldridge, North Chicago Street R. R. Co. v.....	480
Elgin Butter Co. v. Elgin Creamery Co.....	231
Elgin Creamery Co., Elgin Butter Co. v.....	231
Ellis v. Petty.....	636
Engel v. Sellers.....	577
Estate of Schaffner & Co., Baylor v.....	180

F

Faith v. Yocum.....	620
Feltenstein v. Stein.....	426
Filkins, Marder, Luse & Co. v.....	587
Fireman's Insurance Co. v. Thompson.....	339
Fish v. Glover.....	566
Fleming, Homan v.....	572
Foster v. Wynn.....	401
Fowler, Harts v.....	612
Frost v. Rand, McNally & Co.....	276

G

Gager v. Dobson.....	542
Gaynor v. Pease Furnace Co.....	292
Geotz & Brada Mfg. Co., Atchison, T. & S. F. R. R. Co. v.....	151
George H. Hess Co. v. Dawson.....	146
Geuder & Paescheke Mfg. Co. v. Am. Trust & Sav. Bk.....	349
Giddings v. McCumber.....	373
Giffert v. McGuern.....	387
Gilbert v. Block.....	516
Gilbert, Illinois Central R. R. Co. v.....	404
Glover, Fish v.....	566
Goetz, Morse v.....	485
Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.....	390
Great Western Telegraph Company v. Lowenthal.....	447
Gregg v. Savage.....	281
Grimes v. Hilliary.....	641
Groshon, West Chicago Street Railroad Company v.....	463

H

Halfen, Nelson v.....	198
Harms v. Stier.....	234

Harris v. Shebeck.....	882
Harts v. Fowler.....	612
Hasterlik, Bucklen v.....	182
Haussen, Cook v.....	269
Hayden, Ligare v.....	69
Heffron v. Knickerbocker.....	291
Heizelman Bros., Schrader v.....	81
Hess, Thom v.....	274
Higgie, Kaegebein v.....	538
Hill, Sebastian v.....	272
Hilliary, Grimes v.....	641
Hilton, Kerting v.....	487
Holdom, Ancient Order of United Workmen v.....	200
Holmquist, Wenona Coal Co. v.....	507
Homan v. Fleming.....	572
Hooven, Owens & Reutschler Co. v. Burdette.....	115
Hopkins, Vallens v.....	337
Hosher v. Hesterman.....	75
Howard, Seymour v.....	384
Howard & Calkins, Watts v.....	243
Huling, Bolton v.....	591
Huntington, Metzger v.....	337
Huntington v. Metzger.....	222

I

Illinois Central R. R. Co. v. Gilbert.....	404
Illinois Central Railroad Co., Partlow v.....	597
Illinois Central Railroad Co. v. Quirk.....	607
Illinois Steel Company v. Paschke.....	456

J

Jansen v. Siddal.....	74
Johnson v. Brown.....	549
Jones, Conyne Stone Co. v.....	17

K

Kaegebein v. Higgie.....	538
Karlovsy, Schwartz v.....	371
Keeler, Smith v.....	267
Kelly v. Shumway & Johnson.....	634
Kerfoot v. The People.....	409
Kerting v. Hilton.....	487
Ketcham, Bonney & Bonney v.....	321
Kirchoff, Union Mutual Life Ins. Co. v.....	67
Kirkpatrick, Knickerbocker Ice Company v.....	60
Knickerbocker, Heffron v.....	291
Knickerbocker Ice Company v. Kirkpatrick.....	60
Knowlton v. Knowlton.....	71

TABLE OF CASES.

13

Koehler, Booth v.....	870
Kuhn, Phelan v.....	644
Kyne, Clough v.....	120

L

Lagnard v. Rhodes.....	477
Lake Shore & M. S. Ry. Co. v. Ouska.....	334
Lake Shore & M. S. Ry. Co. v. Rohlfz.....	215
Lake Erie & Western Railroad Co. v. Sellman.....	617
Lamprecht, McLean County Coal Co. v.....	649
Langely, Columbian Hard Wood Lumber Co. v.....	100
Lee v. Lee.....	565
Leonard v. The Times.....	427
Lewisohn, Beldam v.....	47
Ligare v. Hayden.....	69
Lindblom v. Williams.....	488
Lobdell, Farwell & Co., Brown v.....	574
Louisville, N. A. & C. Ry. Co. v. Carson.....	552
Lowenthal, Great Western Telegraph Company v.....	447
Ludington, Barnes v.....	90

M

Macfarlane, Snow v.....	448
Magnusson v. Cronholm.....	478
Mandel v. Swan Land & Cattle Co.....	204
Marble, Dick v.....	351
Marder, Luse & Co. v. Filkins.....	587
Martin, North Chicago Street R. R. Co. v.....	247
Massey, McCord v.....	186
Mason v. Strong.....	482
Mason v. The People.....	640
Matson, Richards v.....	530
Mechanics & Traders Bldg. Assn., Phoenix Ins. Co. v.....	479
Metzger, Huntington v.....	223
Metzger v. Huntington.....	377
McCauley v. Coe.....	284
McCord v. Massey.....	186
McCumber, Giddings v.....	378
McDonald v. Watson.....	203
McGinnis, Chicago Consolidated Bottling Co. v.....	325
McGuern, Giffert v.....	387
McKay, Brown v.....	295
McLean County Coal Co. v. Lamprecht.....	649
McMenamin, Scott v.....	121
Milligan v. Nelson.....	441
Monson, Brown v.....	488
Monteath v. Monteath.....	126
Moore v. Shoaff.....	76
Morse v. Goetz.....	485
Mueller v. United States Mutual Accident Association.....	40

N

Nappin v. Abbott.....	615
Needham Company, Orr & Lockett Hardware Co. v.....	57
Nelson v. Halfen.....	198
Nelson, Milligan v.....	441
Nesterman, Hoshier v.....	75
Newberry Library, Attorney-General v.....	166
Noe, Buhl v.....	622
North Chicago Street R. R. Co. v. Eldridge.....	430
North Chicago Street R. R. Co. v. Martin.....	247
North Chicago Street Railroad Co. v. Wrixon.....	307
Northwestern Traveling Men's Association v. Schauss.....	79

O

Oehmen v. Thurnes.....	435
Orr & Lockett Hardware Co. v. Needham Co.....	57
Ouska, Lake Shore & M. S. Ry. Co. v.....	334
Overman & Cook v. Consolidated Coal Co.....	289

P

Pacaud & Co., Traders Insurance Co. v.....	252
Paris Gas Light & Coke Co., Pratt & Co. v.....	603
Parsons v. The People.....	457
Partlow v. Illinois Central Railroad Co.....	597
Paschke, Illinois Steel Company v.....	456
Paul v. Conwell.....	582
Paulsen, Rice & Bullen Malting Co. v.....	123
Peabody v. Dewey.....	260
Pease Furnace Co., Gaynor v.....	292
People, Berkson v.....	102
People, Brady v.....	112
People, Kerfoot v.....	409
People, Mason v.....	640
People, Parsons v.....	467
People, Spindler v.....	613
People, Weigley, Bulkley & Gray v.....	51
Peterson v. Brabrook Tailoring Co.....	249
Petty, Ellis v.....	636
Phelan v. Kuhn.....	644
Phoenix Ins. Co. v. Mechanics & Traders Blg. Ass'n.....	479
Postal Telegraph Cable Co. v. Western Union Telegraph Co.....	62
Pratt & Co. v. Paris Gas Light & Coke Co.....	603

Q

Quirk, Illinois Central Railroad Co. v.....	607
---	-----

R

Rand, McNally & Co., Frost v.....	276
Reinhold, Calumet Furniture Co. v.....	323

Rembarz, Chicago Anderson Pressed Brick Co. v.....	543
Rhodes, Legnard v.....	477
Rice & Bullen Malting Co. v. Paulsen.....	123
Richards v. Matson.....	530
Robinson v. Robinson.....	317
Rogers v. Rogers.....	683
Rohlf, Lake Shore & M. S. Ry. Co. v.....	215
Ryan, County of Cook v.....	190
Ryerson & Son v. Smith.....	270

S

Sanitary District of Chicago v. Cook.....	424
Sanner v. Smith.....	671
Savage, Gregg v.....	281
Scanlan v. Wheeler.....	179
Schauss, Northwestern Traveling Men's Association v.....	79
Schillo v. Anderson.....	403
Schrader v. Heizelman Bros.....	31
Schultz, Toby v.....	487
Schwartz v. Karlovsky.....	871
Schwartz v. Southerland.....	175
Scott v. McMenamin.....	121
Sebastian v. Hill.....	272
Sellers, Engel v.....	577
Sellman, Lake Erie & Western Railroad Co. v.....	617
Selz, Schwab & Co., Goodyear Shoe Machinery Co. v.....	390
Seymour v. Howard.....	384
Shebeck, Harris v.....	382
Sheldon v. Weeks.....	314
Sherwood Letter File Company, A. B. Dick Company v.....	343
Shoaff, Moore v.....	76
Shumway & Johnson, Kelly v.....	634
Siddal, Jansen v.....	74
Smith v. Keeler.....	267
Smith, Ryerson & Son v.....	270
Smith, Sanner v.....	671
Snow v. MacFarlane.....	448
Snydacker v. Swan Land and Cattle Co.....	211
Southerland, Schwartz v.....	175
Spindler v. The People.....	613
Springfield City Ry. Co. v. Clark.....	626
Standard Fashion Co. v. Blake.....	233
Stein, Feltenstein v.....	426
Steinfeld v. Taylor.....	399
Stier, Harms v.....	234
Stolba, Barzynski v.....	388
Strong, Mason v.....	482
Swan Land & Cattle Co., Mandel v.....	204
Swan Land and Cattle Co., Snydacker v.....	211

T

Taylor, Steinfeld v.....	399
The Times, Leonard v.....	427
Thom v. Hess.....	274
Thompson, Firemen's Insurance Co. v.....	339
Thurnes, Oehmen v.....	435
Toby v. Schultz.....	487
Tompkins, Cors v.....	815
Trader's Insurance Co. v. Pacaud & Co.....	252
Tudor Boiler Mfg. Co., Boddie v.....	302
Turnbull, Barker v.....	226

U

Union Mutual Life Ins. Co. v. Kirchoff.....	67
United States Mutual Accident Association, Mueller v.....	40

V

Vallens v. Hopkins.....	837
-------------------------	-----

W

Wabash Railroad Co. v. Brown.....	656
Walsh, Chicago M. & St. P. Ry. Co. v.....	584
Watson, McDonald v.....	203
Watts v. Howard & Calkins.....	243
Weeks, Sheldon v.....	314
Weigley, Bulkley & Gray v. The People.....	51
Weir & Craig Mfg. Co., Bonney v.....	380
Wenona Coal Co. v. Holmquist.....	507
West Chicago Street R. R. Co. v. Binder.....	420
West Chicago Street Railroad Co. v. Bode.....	440
West Chicago Street Railroad Co. v. Groshon.....	463
Western Stone Co. v. Whalen.....	512
Western Union Telegraph Company, Postal Telegraph Cable Co. v.....	62
Westinghouse Electric Co., Dunderdale v.....	407
Whalen, Western Stone Co. v.....	512
Wheeler, Scanlon v.....	179
Wheeling Corrugating Co., Carroll-Porter Boiler & Tank Co. v....	163
Whittaker v. Whittaker.....	268
Whittemore, Elder v.....	662
Wieczorek, Wisconsin Central Railroad Co. v.....	498
Williams, Lindblom v.....	483
Wisconsin Central Railroad Co. v. Wieczorek.....	498
World's Columbian Exposition Co. v. Brennan.....	128
Wrixon, North Chicago Street Railroad Co. v.....	307
Wynn, Foster v.....	401

Y

Yocum, Faith v.....	620
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CASES
IN THE
APPELLATE COURTS OF ILLINOIS

FOURTH DISTRICT—FEBRUARY TERM, 1893.

Conyne, Stone & Co. v. Jones.

1. **ATTACHMENT—*Fraud—Judgment In Rem.***—The fraud as well as the act must be proved in order to justify a judgment *in rem* in attachment proceedings on the ground of a fraudulent transfer of property, but if a transfer is made without consideration by an insolvent, the fraud may be inferred, as every one is presumed to intend the natural consequences of his voluntary act.

2. **ATTACHMENT PROCEEDINGS—*Fraudulent Disposal of Property—Ignorance no Defense.***—It is no defense in attachment proceedings to say that it was not known that the property claimed to have been fraudulently disposed of, could be made subject to the parties' debts, if in fact and law it could be so made subject. Ignorance of the law is no defense, even where interest is essential to be established to constitute crime, and it is not competent to aver such ignorance.

3. **INSURANCE—*Organizations not for Pecuniary Profit—Policies not Commercial.***—Where the object of an insurance association is not for the pecuniary profit of its members insured, by an investment of money or otherwise, but to furnish cheap insurance for the benefit of those dependent upon the insured, and its express provisions are that its members shall receive no money as profits, its policy is not commercial.

4. **INSURANCE—*Associations for Mutual Benefit, not for Gain.—Construction of Statutes.***—The statute relating to mutual benefit life insurance companies, and their contracts with the members, should receive a liberal interpretation in the spirit of the purpose to be accomplished. They should not receive the strict and rigid construction as applied to the law of descent but rather the free construction as applicable to the law of wills.

5. **INSURANCE—*Contract—Naming the Beneficiary.***—So far as the naming of the beneficiary in a certificate of mutual benefit insurance is

concerned, such certificate partakes of the nature of a will, and, without consideration like a will, is a mere declaration of a purpose to bestow a bounty which until death vests no rights of property in the legatee or beneficiary.

6. **CONTRACTS OF INSURANCE—*Notice of the Contract.***—Where a person enters into a contract of insurance, and pays the premiums or assessments, it exists as a contract between him and the company or association alone. If he fails or refuses to pay the premium or assessments, the beneficiary can not compel him to pay; nor can such beneficiary compel the company or association to receive such payment from him to prevent a forfeiture; neither could he pay in the name of the insured and thereby make himself voluntarily the creditor of the insured.

7. **INSURANCE—*Beneficiaries in Policies—Vested Rights.***—The beneficiary named in a policy of life insurance has no vested right of property in the policy; the nature of the right comports more nearly with the legal idea of a proposed or unexecuted gift.

8. **INSURANCE—*Right to Change the Beneficiary.***—Where a contract of insurance is made and the consideration is paid by the insured for the benefit of another, the beneficiary may be changed at any time by the consent of the contracting parties, though no reservation therefor was originally made.

9. **INSURANCE—*Assignment of Policy—Reservation.***—When a policy of insurance having a commercial value was assigned, with the consent of the insurance company, and the assignment contained a clause providing, in the event of the death of the assignee before the death of the assignor, then the policy should revert to him the same as if no assignment had been made, *it was held*, that the limitation in the assignment gave the assignee no right to revoke the policy or in any way change it during the life of the assignor.

10. **INSURANCE—*Power to Assign Policy with Limitations.***—An assignment of an insurance policy by a husband to his wife, with a limitation expressed in the assignment that in the event of her death before the assignor, it was to revert to him, the said assured, the same as if no assignment had been made, contravenes no law and is not against public policy.

11. **INSURANCE—*Policy a Chose in Action.***—A policy of insurance having a commercial value is property, and in general terms is called a chose in action. If fraudulently disposed of to defeat creditors it may be reached by a creditor's bill.

12. **FRAUD—*Disposal of Insurance Policy to Hinder or Delay Creditors.***—It is a fraud, within the meaning of the attachment act, to dispose of, to hinder creditors, any kind of property that might be used by them to satisfy their debts; a policy of insurance having a commercial value is such property, and if assigned or disposed of for such a purpose fraudulently, it may be reached by attachment.

Memorandum.—Attachment proceedings. Appeal from the Circuit Court of Randolph County; the Hon. BENJAMIN R. BURROUGHS, Judge,

Conyne, Stone & Co. v. Jones.

presiding. Heard in this court at the February term, 1893. Reversed and remanded. Opinion filed June 26, 1893.

STATEMENT OF THE CASE.

This suit was a proceeding in attachment brought by the appellants, who are wholesale dealers in clothing, against appellee, who conducted a retail business in clothing, etc., under the style of "G. S. Jones, agent." The ground for the attachment alleged in the affidavit, is that appellee had within two years, then last past, fraudulently conveyed or assigned her property, or a part thereof, so as to hinder and delay her creditors. No contest is made as to the existence of a debt, and judgment has been entered in favor of appellants and against appellee for the amount claimed by appellants, \$1,051.90. On the attachment issue, however, the finding and judgment were in favor of the defendant, and the attachment was quashed. From this judgment an appeal has been taken, which brings before this court the attachment issue, and the questions involved in and connected with it. On the trial below only one act of appellee was attacked as fraudulent, namely, her transfer without consideration to her son and daughter, one day before confessing judgment in favor of her son-in-law, of certain policies of insurance held by her as assignee on the life of her husband, a man seventy-five years old, one of which policies had then a cash surrender value of more than \$1,100. The attachment writ of appellants was levied on the goods in the store of the appellee, subject to a prior levy of an execution in favor of George Neville, under which said goods were then held and under which they were thereafter sold, except about \$150 worth. There were some old accounts, but they were substantially worthless. It is not disputed but that at the time of the assignments of these policies the appellee was insolvent and about to fail in business, and that no consideration was paid or promised for the assignments. There were two policies of insurance, or rather one policy and one certificate of membership in a mutual benefit society, taken out by Gabriel S. Jones, the husband of appellee;

one in the Masonic Pythian Association of Chicago, Illinois, a mutual benefit organization, and the policy in the Mutual Benefit Insurance Company of New Jersey, the former for \$3,000, and the latter for \$3,300; the date of the issue of either, originally, is not shown by this record. The former was originally taken out by the husband in his name and on his contract for the benefit of his wife, the appellee, while the latter was taken out for his own benefit. Both had been issued for many years before this suit was instituted. The policy was used by Gabriel S. Jones as collateral security for \$740 which he obtained as a loan from the company in 1885, and thereafter, on the 17th day of August, 1885, it was transferred by mesne assignments to the appellee by the consent of the company. Shortly before the failure of appellee in business, these evidences of insurance were transferred to the son and daughter of Gabriel S. and Lucinda M. Jones.

The certificate was surrendered for cancellation and a new one issued. The policy was assigned by appellee with the consent of the company, at which time it had a cash surrender value of \$1,191.18 over and above the \$740 of loan heretofore mentioned. The certificate which was introduced in evidence makes no provision for a change of the beneficiary. No rule or regulation of the association was introduced to show what they provided for in this regard. The same is true as to the policy, which was not introduced in evidence, and therefore its terms or conditions are not known.

APPELLANTS' BRIEF, SHEDD & UNDERWOOD, AND H. CLAY
HORNER, ATTORNEYS.

The appellants contended that the rule as to fraudulent alienation includes life insurance policies, which are choses in action. *Bank v. Hume*, 128 U. S. 204; *Drake v. Rice*, 130 Mass. 410; *Stokoe v. Cowan*, 29 Beav. 637; *Burton v. Farinholt*, 86 N. C. 260; *Anthracite Ins. Co. v. Sears*, 109 Mass. 383; *Ionia Bk. v. McLean* (Mich.), 48 N. W. Rep. 159.

A life insurance policy before the decease of the assured is

property and belongs to the beneficiary. *Glanz v. Gloeckler*, 104 Ill. 573; *Sauerbier v. Union Central Life Insurance Co.*, 39 Ill. App. 620; *Putnam v. New York Life (La.)*, 7 So. Rep. 620; *Lemon v. Phoenix*, 38 Conn. 294; *May on Insurance*, 391; *Hubbard v. Stapp*, 32 Ill. App. 545; *Troy v. Sargent*, 132 Mass. 408; *Hutson v. Merrifield*, 51 Ind. 24; *Harley v. Heist*, 86 Ind. 196; *Bank v. Hume*, 128 U. S. 204.

A life insurance policy can not be transferred without the consent of the assignee, or beneficiary. *Pence v. Makepeace*, 65 Ind. 358; *Newcomb v. Mutual Life Ins. Co.*, 9 Ins. Law Jour. 124; *Ferdon v. Canfield*, 104 N. Y. 143; *Wilmaser v. Cont. Life Ins. Co.*, 66 Iowa, 417.

A policy of life insurance or its proceeds, is not exempt under the statute from debts of wife, who is beneficiary or assignee, but only from those of the husband, being the assured. *Smedley v. Felt*, 43 Iowa, 607, under Iowa Statute, Vol. 1, Sec. 1756, page 441 of McClain's Rev. Stat.; *Murray v. Wells*, 53 Iowa, 256; *Norris v. Mass. Mut. Life Ins. Co.*, 131 Mass. 294.

APPELLEE'S BRIEF, HARTZELL & SPRIGG, ATTORNEYS.

It was contended by the appellee that in the absence of any statute affecting the question, the true rule is that the beneficiary named in the policy, while taking such an interest in it as entitles him or her to receive the money when by the terms of the policy it becomes payable, yet such interest is a mere expectancy and subject to the right of the insured, who pays the premiums and retains control of the policy, to dispose of it, or to change the beneficiary, with the consent of the insurer. *Johnson et al. v. Van Epps*, 14 Brad. 209; *Clark v. Durand*, 12 Wis. 223; *Gambs v. Mutual Life Ins. Co.*, 50 Mo. 44; *Doll v. Lincoln*, 31 Mo. 428; *Eadie v. Slimmon*, 26 N. Y. 9; *Smillie v. Quinn*, 90 N. Y. 492.

The assignment of an insurance policy, held by the wife as beneficiary, on the life of her husband, and payable to her at his death, even though she be insolvent, is not fraudulent as to her creditors. *Cole v. Marple*, 98 Ill. 58; *Smillie v. Quinn*, 90 N. Y. 492; *Martin v. Stebbings*, 126 Ill. 387.

All the beneficiary has in a life insurance policy, during the life of the policy holder, owing to the right of revocation reserved by the company, is a mere expectancy, dependent upon the will and the acts of the insurer and insured. *Martin v. Stebbings*, 126 Ill. 387.

This interest is not property and can not be attached or transferred in any way without the consent of both the company and the insured, and neither can the beneficiary be changed without his consent and release, accepted by the company. *Cole v. Marple*, *Smillie v. Quinn*, *Martin v. Stebbings*, *supra*; *Pence v. Makepeace*, 65 Ind. 358; *Johnson et al. v. Van Epps*, 14 Brad. 209.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The material question for determination is, as to the act of the appellee in assigning the insurance policy in the Mutual Benefit Insurance Company of New Jersey, to her son and daughter, which had at the time a cash surrender value to her of \$1,198.18 over and above the \$740 which the company had advanced to her husband thereon, and the surrender for cancellation and exchange of the certificate of membership in the Masonic Pythian Association of Chicago, so that her son and daughter might be made the beneficiaries therein, instead of herself. It is conceded that these transfers were made without any consideration, the effect of which inevitably would be to hinder and delay creditors, if that so transferred was appellee's property, which the creditors were entitled to and could claim for the purpose of applying toward the satisfaction of their debts. While it is true that the fraud, as well as the act, must be proven in order to justify a judgment in attachment *in rem* on the ground of a fraudulent transfer of property (*Shove v. Farwell*, 9 Brad. 256), yet if a transfer is made without consideration by an insolvent, the fraud may be inferred, as every one is presumed to intend the natural consequences of a voluntary act. It is not a defense to say that it was not known that such property could be made subject to such party's debts, if in fact and law they could be so made sub-

ject. Ignorance of the law is no defense, even where intent is essential to be established to constitute crime, and it is not competent to aver such ignorance. Brown's Legal Maxims, pp. 253, 267.

This case, however, in the arguments of counsel, is made to hinge upon the question as to whether appellee had a *vested* interest in the insurance so transferred on merely an *expectancy*. The policy is in the regular line of insurance, while the certificat  is, as held in the case of Martin v. Stebbings, 126 Ill. 403, in the *nature* of regular mutual life insurance, and therefore, as a contract, is subject to the law of such insurance, except as modified by the objects and policy of such associations.

In the arguments of counsel this distinction between the two evidences of insurance is not noted as being of any consequence. The appellants' counsel broadly asserts that the interest of a beneficiary is vested at once on the issue and delivery of the policy or certificate to the insured, although the contract is between the insured and the company, and claims, as to the regular policy, that when it was assigned to the appellee, she then held the relation to it of a beneficiary, with such vested rights as neither the insured nor the insurer could revoke or destroy without her consent.

The appellee's counsel, on the contrary, asserts that her rights rested merely in expectancy, with the right in the insured—as both contracts were made with him—to revoke and change the beneficiary at his pleasure. It will be observed, from the statement of facts, that the record does not contain any of the by-laws, rules or regulations of either company in regard to the right of the insured to change the beneficiary; that the *regular policy* is not in the record, so that its terms and conditions are not known, and that the *certificate* of membership itself, which is in the record, makes no provision for such change.

In the case of Martin v. Stebbings, 126 Ill. 404, it is held that the beneficiary named in a *certificate of membership*, in a mutual benefit association, acquires no vested right to the

benefit to accrue upon the death of the member until such death occurs, and therefore the member's right to change is only limited *by the restrictions imposed by the association itself*.

True, as a reason, it is suggested that the right of the member to revoke the certificate or surrender the same for cancellation—of which act the wife could not complain—carries with it the right to change the beneficiary (*ibid.* 407).

This ground of the right to change is not merely based, as understood, upon the law of the association giving such right, but upon a common-law right; for it is said (*ibid.* 404), cases where a different rule has been announced seem to be confined to those where the organic law of the society *prohibits* a change in the first beneficiary.

The additional reason, as understood, is also given that the association in the Martin case had expressly reserved in its constitution the right of the member to make such change. But the reason is not understood to be exclusive of or paramount to the other reasons given for so holding.

The right of one making a contract with an insurance company of any kind, insuring his life for the benefit of another, at his own expense, to change the beneficiary by the consent of the insurer, is broadly stated in the case of Johnson et al. v. Van Epps, 14 Brad. 209, and the case of Glanz v. Gloeckler, 104 Ill. 573, is clearly distinguished.

The position there taken as to the effect of the Glanz case is approved by the Supreme Court in the same case, 110 Ill. 558. The able review of the decided cases in the opinion of Johnson et al. v. Van Epps, 14 Brad. 206, *et seq.*, upon which the law, as laid down in Bliss and May on Insurance, was based, and of the decisions based upon those works, shows that the origin of the rule of law, that the insured could not change his beneficiary, grew out of special statutes or contracts made between the beneficiary and the insurance company, at least in terms, as in the Glanz case, 104 Ill. That the Supreme Court in the Johnson v. Van Epps case, 110 Ill., was favorably inclined to the rule of law as laid

down by the Appellate Court, is clearly indicated by the language used on page 558 of that opinion. It is there said that this position is supported by many analogies of the law, as well as by express adjudication, it must be conceded, and the cases of *Clark v. Durand*, 12 Wis. 223, *Kennan v. Howard*, 23 Wis. 108, *Foster v. Gile*, 50 Wis. 603, and *Gambbs v. Mutual Life Insurance Company*, 50 Mo. 44, are cited as so holding.

In the cases of *Hubbard v. Stapp*, 32 Ill. App. 541, and *Sauerbier v. Union Central Life Ins. Co.*, 39 Ill. App. 620, the rule of law contended for by appellants seems to be asserted on authority of the *Glanz* case in the Appellate and Supreme Courts; *Johnson* case, 110 Ill. 551; *Bank of Washington v. Hume*, 128 U. S. 204; *Gould v. Emerson*, 99 Mass. 154, and *Bliss on Insurance*. In the *Johnson* case, 14 Brad. 207-8, these authorities from which emanate this rule are all reviewed except the *Hume* case in 128 U. S., where, as heretofore suggested, it is clearly shown that they are made to depend upon special statutes or contracts made by and on the part of the beneficiary.

An examination of the *Hume* case will show it is no exception. The vesting of the interest in the policy in the beneficiary at once on its issue, is there made to depend upon the statutes and charter regulating these insurance companies as to a part of the insurance, and on the fact as to the residue, that the contract was made between the insurance companies and the wife, who was the beneficiary, and the *Glanz* case, 104 Ill. 573, is there cited. In addition to this, the bill was filed in the *Hume* case by the Bank of Washington, after the death of Thos. L. Hume, and the interest had actually thereby, in any view, vested in the beneficiary. The purpose of the bill was to reach the fund—which by the death of Hume under the contract, had vested in his wife, who survived him—on the ground that Hume, being insolvent at the time the contracts of insurance were made, a fraud had been perpetrated on the creditors that entitled them to the fund, or at least to the premiums he had paid thereon.

In no view does this case seem to be an authority against the right of an insured person to change the beneficiary during his lifetime, as that question was not involved. In so far, however, as general principles are there discussed, relating to that right, the care with which the statutes of the different States wherein the insurance companies affected were located, as well as the charters of some of such companies, are set out in the opinion, and the conclusions thereon, seem to be in line with the rule of law announced in the Johnson case, 14 Brad. 201.

The Supreme Court of this State, so far as opinions have been announced, has not unequivocally passed upon the question as to the common law right of an insured, who makes the contract in his own name with an insurance company, and thereby obligates himself to pay the premiums or assessments for the benefit of another, to change the beneficiary, with the consent of the company. In the Johnson case, 110 Ill. 558, this rule of law seems to be found, while in the case of Catholic Knights of America v. Franke, 137 Ill. 123, it is said that in such case, in an ordinary life insurance policy, it may be that no valid change can be made without the consent of the beneficiary. Therefore we feel free to pass upon the question according to our views of the law on the subject, from a common-law standpoint. We think the right of property in appellee is not the same in the certificate of membership in the Masonic Pythian Association, as in the Mutual Benefit Life policy. The original purposes of the two corporations were in a distinct sense different.

The object of the former corporation is not for the pecuniary profit of its members insured (Sec. 1, Chap. 73) by an investment of money or otherwise; which is a distinct and an important feature of regular life insurance. Its primary purpose is to furnish cheap insurance for the benefit of those dependent upon the insured, although its benefits may be extended to a class called in said section "devisees or legatees." It is expressly provided that its "members shall receive no money as profit." Its policy, therefore, is not

commercial, or its object gain, but humane. The words "devisees or legatees" are technically applicable to a will, denoting the person or persons to whom a gift is made.

The central thought is protection for dependents on the insured, as widows, orphans or relatives, against the accidents of life, especially by those of small means.

Practically it is known that this class, as a rule, avail themselves of this kind of life insurance. Its small assessments, though frequent, it is considered brings the advantages of life insurance within their reach, so that they may provide for their families or others dependent upon them.

Therefore the statute and the contract should receive a liberal interpretation in the spirit of the purpose to be accomplished. They should not receive the strict and rigid construction as applied to the law of descent, but rather the free construction as applicable to the law of wills.

The head of the family, or one who has others depending upon him, will as a rule, take out such life insurance, and as he is intrusted in the first instance with the bestowal of his little bounty—knowing best to whom it should go, he also best knows when changes of circumstances, which are continually occurring in almost every family, require a change of his beneficiary. As, for instance, if one child becomes crippled, or its health permanently impaired by disease, after the certificate of insurance is taken out, while the other is healthy and robust, or one child becomes disobedient, wayward, a deserter of his home and a spendthrift, after the insurance is taken out, while the other child or children of the family are obedient, loving and promise to be a joy and support instead of a sorrow and burden to the parents, and such instances are not rare in the best regulated families—should not the one who makes the contract and pays all the consideration have the right to change the beneficiary under such circumstances, if the other party to the contract consents, although such right was not originally reserved? These instances are only given for illustration; many others will suggest themselves where the reasons for change will arise that are equally potent. These sug-

gestions, it is true, are applicable to regular life insurance, and as to it we think the law is, and ought to be, that such change can be made; but the force of them, it seems to us, is accented by the fact that these mutual benefit insurance associations are not for pecuniary profit, as are regular life insurance corporations, and primarily, are not commercial but charitable in their objects and policy.

So far as the naming of a beneficiary is concerned, such a certificate partakes of the nature of a will, and without consideration, like a will, is a mere declaration of a purpose to bestow a bounty which, until death, vests no rights of property in the legatee or beneficiary. Why should it not be so on the principles of the common law? Where the assured makes the contract and pays the premiums or assessments it exists as a contract between him and the insurer alone. If the assured failed or refused to pay the premium or assessment, the beneficiary could not compel the assured by a proceeding in law or equity, to continue the payment, on the ground of an original promise as evidenced by the certificate or policy. Such beneficiary would have no legal ground of complaint of a failure to make such payment, or of the insured's surrender of the certificate or policy for cancellation. *Martin v. Stebbings*, 126 Ill., at page 407. Such beneficiary could not require the company or association to receive such payment from him to prevent a forfeiture, for the reason there was no contract for payment by such beneficiary. Neither could he pay in the name of the insured, and thereby make himself voluntarily the creditor of the insured. How can the right of property in such a policy be said to *vest* in the beneficiary immediately upon its issue, when the law affords such beneficiary no remedy for its protection from destruction? To destroy a vested right of property in another willfully is to commit a wrong. It is the boast of the common law that there is no wrong without a remedy, and yet the insured in such a policy can surrender it for cancellation without the consent of the beneficiary, or refuse to continue payments, which will work a forfeiture, although thousands of dollars in premiums have been paid.

This is not consistent with the legal idea of a vested right. It comports more nearly with the legal idea of a proposed or unexecuted gift, in which case there is a right of revocation at pleasure. The fact that the beneficiary has an interest in and the right to insure such life on his own contract, and for his own benefit, does not of itself work any estoppel or afford a consideration as proceeding from the beneficiary. He is left free to insure such life on his own contract, as in the Glanz case. As is said in the case of *Johnson v. Van Epps*, 110 Ill., at page 558, the right of an insured under such a contract to change his beneficiary at pleasure, is supported by many analogies of the law, as well as by express adjudications. We suggest further that the insured ought to have such right, for the reason that to deprive him of it, is to force him to forfeit his policy in order to change his beneficiary, and thereby lose what has been paid, as well as to increase the rate of insurance on a new policy on account of increased age. He can not be deprived of this right, although it results to the benefit of the insurer, whose profits, in the regular line especially, are largely made up of lapsed policies. Our conclusion, therefore, is based upon the law and considerations of public policy, that when the contract is made, and consideration paid by the insured for the benefit of another, the beneficiary may be changed by the agreement of the contracting parties, though no reservation therefor was originally made. The Mutual Benefit Life policy for \$3,300 was, as shown by the statement, assigned to Lucinda M. Jones, with the consent of the company, on August 17, 1885, by Gabriel S. Jones, who had, many years before, taken out the policy for his own benefit. There was this clause in the assignment: "In the event of her death before the said Gabriel S. Jones, Sr., to revert to him, the said assured, the same as if no assignment had been made." This policy was, by the assignee, Lucinda M. Jones, on the 8th day of March, 1892, assigned, without consideration, to her son and daughter. On January 26, 1892, this policy had a cash surrender value of \$1,191.18.

We think the right of property in this policy was in Lu-

cinda M. Jones, with only the naked legal title in her husband, Gabriel S. Jones. U. S. Life Ins. Co. v. Ludwig, 103 Ill. 305.

The effect of such a transaction was the same as if the policy in the first instance had been taken out by the wife on the life of her husband in a contract made between the company and her personally.

After the assignment was made and assented to by the company, it could not be repudiated by Gabriel S. Jones or the company, but under the assignment the policy was held by Lucinda M. Jones for her sole use and benefit, subject to the limitation in the assignment itself. *Cole v. Marple et al.*, 98 Ill. 58, 66.

This authority is conclusive on this question. The limitation in the assignment gave Gabriel S. Jones no right to revoke the policy or in any way change it during her life. Under the statute on insurance (Sec. 19, Chap. 73, par. 111, *Star and C.*, p. 1345), she had the right to provide in the policy that in case of her death before it became due or before the death of her husband, the amount of the insurance should be payable to his, her or their children, and the provision in the assignment that the husband should have the benefit of the policy in case of her death before his, contravenes no law and is not against public policy. *Johnson et al. v. Van Epps*, 110 Ill. 562. So this policy, before its last assignment to the children, was the same as if it had provided for the payment of the insurance to her husband in case of her death before his.

Such a provision, however, would not have given him any more control over the policy, or interest in it, than it would the children, if it had been so made payable to them as provided by the statute, on the happening of the event of her death before his. The property in the policy would rest and vest in her, subject to be divested on the happening of a contingent event. The husband would only be a contingent beneficiary and have no present or vested interest in the policy. A policy is property, and in general terms is called a chose in action. U. S. Life Ins. Co. v. Ludwig, 103

Ill. 305. If fraudulently disposed of to defeat creditors, it may be reached by a creditor's bill. *Cole v. Marple et al.*, 98 Ill. 58. It is a fraud within the meaning of the attachment act, to dispose of any kind of property to hinder or delay creditors, that might be used by the creditors to satisfy their debts, if done fraudulently.

A policy of insurance is such kind of property, the same as a note. *Ionia Bank v. McLean* (Mich.), 48 N. W. Rep. 159.

If the views herein expressed are correct, then the proof sustained the attachment and the court erred in quashing the writ. The judgment is reversed and the cause remanded.

Schrader, Assignee, etc. v. Heinzelman Brothers et al.

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1. **STOCKHOLDER**—*May Become a Creditor*.—A stockholder in a corporation may become a creditor of the corporation, but this right relates to an existing and not to a defunct corporation.

2. **STOCKHOLDERS**—*Director-Stockholder's Right to Purchase Property, etc.*—The director-stockholder of a corporation, may, as to other stockholders who have an opportunity to contribute to relieve an insolvent corporation from its debts, purchase the property of the corporation at a foreclosure sale, and the other stockholders will have no right to complain; but this right relates to the rights of the stockholders as between themselves.

3. **STOCKHOLDERS**—*Rights of Stockholder Creditors*.—If a stockholder becomes the creditor of his corporation in good faith, during its existence and while operating as such, he would doubtless have the right to share *pro rata* in the distribution of the assets of the corporation the same as a non-stockholder creditor.

4. **STOCKHOLDERS**—*Creditors Withdrawing Their Claims Against the Assets in the Hands of the Assignee*.—Where a stockholder in an insolvent banking corporation, which had made an assignment, purchased the bank's certificates of deposit at a large discount for the express purpose of relieving himself from his individual liability, as a stockholder, to the creditors of the bank, and filed them with the assignee as a creditor of the bank, and afterward withdrew them and put them in judgment against the bank, it was held that the effect of such use of the certificates was equivalent to their withdrawal as claims against the assets in the hands of the assignee.

5. **STOCKHOLDER CREDITOR—Purchase of Certificates of Indebtedness—Surrender to Assignee.**—Where a stockholder of an insolvent banking corporation purchased certain certificates of deposit at a discount and filed them with the assignee of a corporation as creditor against the corporation, and afterward surrendered them to the assignee for cancellation, and allowed them so to remain for the period of thirteen years, *it was held* that the effect of such surrender was to withdraw such certificates as claims against the estate of the insolvent bank and cause them to be of no validity whatever except for the purpose of use in enforcing contribution among the stockholders.

6. **CORPORATION INSOLVENT—Effect of Stockholders Purchasing Indebtedness, etc.**—Where a stockholder in an insolvent corporation purchased certain certificates of indebtedness and filed them with the assignee for the purpose of receiving the dividend with the other creditors of the corporation, and afterward surrendered a part of those to the assignee for cancellation, and put the balance of them in judgment against the corporation, and afterward satisfied the judgment, *it was held* that such certificates could not be, in fact, surrendered for cancellation or put in judgment and the judgment satisfied, and at the same time be binding as claims against the estate of the insolvent corporation in the hands of the assignee.

7. **CORPORATIONS INSOLVENT.**—Under the law of the stockholder's liability, the amount for which a stockholder is liable to the creditors of an insolvent corporation, is as much a fund for the security of the creditors as the assets in the hands of the assignee.

8. **STOCKHOLDER'S LIABILITY—Voluntary Payment of the Creditor.**—A voluntary payment by a stockholder of an insolvent corporation to a creditor, after such stockholder's personal liability attaches, does not enable such stockholder to take an assignment of such corporation debt and put it in as a claim against the fund of the corporation, in the hands of its assignee, to share, *pro rata*, either to the amount so paid, or to the amount of the face of the debt, with other corporation creditors.

9. **CORPORATIONS INSOLVENT.—Payment of Debts by Stockholders.**—Where a stockholder of an insolvent corporation makes a payment of a debt to the creditors, such payment extinguishes the debt of the corporation to the amount of the debt so paid and extinguishes the amount of his own liability as a stockholder to the extent of the sum so paid by him.

10. **INSOLVENT ESTATES—Right of the Debtor to Purchase His Own Debt.**—A debtor may pay his debt, but he can not purchase it so as to present it as a living chose in action against himself, to share in the assets in the hands of an assignee, with other creditors.

11. **STOCKHOLDERS—Relation to the Corporation after Failure.**—A stockholder of an insolvent corporation, after its failure to pay its debts, does not stand in the relation of surety or guarantor to the corporation in the sense that they can utilize the debts of the corporation paid by him as claims against the corporation, the same as other outside creditors.

Schrader v. Heinzelman Bros.

The payment of such a debt by a stockholder is a payment by him of an original liability, and therefore as completely extinguishes it as if paid by the corporation itself.

12. STOCKHOLDERS—*Liability in Insolvent Corporations*.—A stockholder does not become liable until the corporation has failed to pay its debt; but when that condition arises, then the protection of the corporation to the extent of the face value of his stock is withdrawn by the law, and his liability as to such debt by operation of the law becomes that of the partner, and such debt, as between the stockholder and the creditor, is in law as if directly contracted originally between such creditor on the one hand and such stockholder, as partners, on the other hand, regardless of the fact that there ever was a corporation.

13. CORPORATIONS—*Insolvency—Effect of Stockholders Taking Up Certificates of Indebtedness*.—Where a stockholder of an insolvent banking corporation purchases certificates of indebtedness which had been issued by the bank, and which comprised a part of its indebtedness, it was held that the legal effect of such purchase was to pay and extinguish the debts of the bank so far as the other creditors were concerned.

Memorandum.—Proceedings under the insolvency act. Error to the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the February term, A. D. 1893. Reversed and remanded. Opinion filed June 26, 1893.

STATEMENT OF THE CASE.

The People's Bank of Belleville, Ill., of which appellees were stockholders, failed and made an assignment under the statute, April 22, 1878. After the failure, these stockholders, defendants in error, individually bought up, in the aggregate, \$4,575 worth of certificates of deposit of various persons, who were creditors of the bank at the time of its failure, paying for most of it from fifteen to thirty per cent of its face value, seventy-five cents on the dollar having been paid for one certificate of deposit of \$200. Assignments of these certificates of indebtedness of the bank were made to the respective parties purchasing the same, and such evidences of indebtedness were filed with the assignee within three months after such assignment, as provided by law. Thereafter, on the 11th day of September, 1878, these stockholders, with the purpose of extinguishing their individual liability, which, under the law, was the face value of the stock in the bank held by each respectively, confessed

judgment in the Circuit Court of St. Clair County in favor of each other on a part of said indebtedness so purchased by them, which judgments were entered satisfied on the record by the parties within a day or two thereafter, although in fact none of the judgments were paid, nor any part thereof. On the 19th day of September, 1891, some thirteen years after the judgments were taken and satisfied, the parties, all by consent, notice being served on each other of the motion, obtained an order of court, setting aside the entry of satisfaction, the order of judgment in each case, and permission to dismiss the same from the docket. It also appears that certain other of these certificates of deposit so purchased, were, on the 8th day of April, 1879, surrendered by a Mr. Harrison to the assignee for cancellation for the purpose of releasing himself and a Mrs. Harrison from their liability as stockholders to the creditors of the bank. It appears that such certificates of indebtedness were placed in Harrison's hands for that purpose by Amos Thompson, his father-in-law, one of these defendants.

It further appears that the assignee of the bank had declared and paid a dividend to the creditors of the bank, other than these stockholders, of twenty per cent. On the 26th day of June, 1891, while said judgments were of record as such, these defendants appeared in the County Court and moved that the assignee of the bank be ordered to pay them a dividend of twenty per cent on their certificates of indebtedness, which motion the court, on the 21st day of July, 1891, denied, and rendered judgment against appellees for costs, who thereupon took an appeal to the Circuit Court, where the cause was heard and decided in favor of these defendants at the January term, 1892, of said court. The court ordered the assignee to pay these defendants a dividend of twenty per cent upon the face value of each of said certificates, and that thereafter their certificates should share *pro rata* with the other creditors, out of the remaining assets, on their face value. From this order of the court the assignee of the insolvent bank prosecutes this writ of error.

Schrader v. Heinzelman Bros.

BRIEF OF PLAINTIFF IN ERROR, MARSHALL W. WEIR AND
CHARLES P. KNISFEL, ATTORNEYS.

The plaintiff in error contended that the ruling of the County Court excluding these certificates from a participation in dividends was right, and the ruling otherwise by the Circuit Court was erroneous, citing *Thompson v. Meisser*, 108 Ill. 363.

BRIEF OF DEFENDANT IN ERROR, HAMILL & BORDERS,
ATTORNEYS.

Where a case is tried by the court, without a jury, and no propositions of law are submitted to be held by the court, it will be presumed that all questions of law were correctly decided. *Davies v. Phillips*, 27 Ill. App. 387; *Levy v. Glickauf et al.*, 41 Ill. App. 251; *Hobbs v. Ferguson's Estate*, 100 Ill. 232; *Finch v. Johnson*, 104 Ill. 111; *Wrought Iron Bridge Co. v. Commissioners, etc.*, 101 Ill. 518.

The presumption of the law is in favor of the correctness of the judgment of the trial court, and it will be presumed that the law was properly applied to the facts by the court sitting as a jury, unless the record affirmatively shows error in that regard. *Belleville Savings Bk. v. Bornman et al.*, 124 Ill. 200; *Edgerton v. Weaver*, 105 Ill. 48; *Leonard v. Patton*, 106 Ill. 99; *Paddon v. People's Insurance Co.*, 107 Ill. 196; *Casner v. Preston*, 109 Ill. 531; *Miller v. Life Insurance Co.*, 110 Ill. 102.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The sole question is, were the defendants in error, under the facts stated, entitled to share with the other creditors in the assets of the bank. The exception preserved to the order of the court, overruling the motion for a new trial and entering judgment on the finding, with the assignment of error thereon, raises that question. There is no real dispute as to the facts, which summarized are, first, the defendants in error were stockholders of the bank at the time of its failure; second, the bank was indebted at that time, as

evidenced by its certificates of deposit; third, the defendants in error, *after* such failure, purchased at a large discount, over \$5,000 of such certificates; fourth, such certificates so purchased were filed with the assignee of the bank in due time; fifth, that a part of said certificates were thereafter on the part of a stockholder and by the consent of one of these defendants in error, presented to the assignee for cancellation in favor of the creditors of the said bank; sixth, that the other certificates of deposit so purchased by these defendants in error were put in judgment and these judgments satisfied of record, for the purpose of relieving such stockholders from their individual liability; seventh, which judgments and entries of satisfaction were, after the lapse of some thirteen years, set aside on the order of the court by the consent of these defendants in error—the parties thereto.

The solution of this question depends upon, first, the rights acquired by these stockholders by their purchase of these certificates of the bank's indebtedness, *after* the failure of the bank; second, the effect of these judgments on such certificates as were put in judgment, and the effect of the surrender of the other certificates to the assignee for cancellation, for the benefit of the creditors of the bank.

That stockholders may become the creditors of their own corporation has been decided. *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Harts v. Brown*, 77 Ill. 226.

The director stockholders may, as to other stockholders, who have had an opportunity to contribute to relieve an insolvent corporation from its debts, purchase the property of the corporation at a foreclosure sale, and the other stockholders will have no right to complain. *Hart's case*, *supra*.

It will be observed, however, that the decisions holding that a stockholder may become a creditor of his own corporation, relate to an existing and not a defunct corporation, and that the decision as to the right of one or more stockholders to purchase the property of the corporation at a foreclosure sale, relates to the rights of the stockholders as between themselves.

If such stockholders become creditors in good faith during the existence of the corporation, and while operating as such, then doubtless such creditor stockholders would share *pro rata* in the distribution of the assets of the corporation, the same as a non-stockholder creditor.

These stockholders, however, purchased these bank certificates of deposit at a large discount, after the corporation, of which they were stockholders, had made an assignment for the express purpose of relieving themselves from their individual liability, as such stockholders, to the creditors of their corporation. While it is true such certificates were filed with the assignee, yet these stockholders withdrew them as claims against the assets, by surrendering some of them to the assignee for cancellation and by putting the others in judgment in the Circuit Court. The effect of such use of the certificates was equivalent to their withdrawal. Suppose the original owners of these certificates had, after filing them with the assignee, withdrawn and brought suit on them in the Circuit Court against these stockholders and obtained judgments on them, and then without fraud or mistake entered satisfaction of such judgments; certainly they could not have come in after a period of thirteen years, refile them and ask to share in the assets of the bank. How are these parties placed in any better position by being assignees of such certificates and stockholders in the bank?

The fact that they did not succeed, in law, by such proceedings, in relieving themselves from the individual liability to the full amount of the face value of such certificates, does not, it seems to us, determine the effect of such proceedings upon the certificates themselves, either as to withdrawal from before the assignee or merger in the judgments. We see no escape from the conclusion, as to these certificates of indebtedness that were in fact surrendered to the assignee for cancellation, and those certificates, that were in fact put in judgments and those judgments receipted, that they were withdrawn as claims against the estate of the insolvent bank, and ceased to be of any validity whatever except for the purpose of use in enforcing contribution

among the stockholders. Such certificates could not be in fact surrendered for cancellation or put in judgments and those judgments satisfied, and at the same time, be pending as claims against the estate. We do not wish, however, to rest our decision upon this view alone, of the withdrawal of the claims from before the assignee.

We understand that under the law of liability of these stockholders, the amount for which they were liable to the creditors of the bank was as much a fund for the security of the creditors, as the assets of the bank (*Eames v. Doris*, 102 Ill. 350; *Tunesma v. Schuttler*, 114 Ill. 156; *Queenan v. Palmer*, 117 Ill. 619-628); and that a voluntary payment by a stockholder to a creditor, after such stockholder's personal liability attaches, does not enable such stockholder to take an assignment of such corporation debt and put it in as a claim against the funds of the corporation, to share *pro rata*, either to the amount he paid or to the amount of the face of the debt he so took up, with other corporation creditors. By such payment, such stockholder extinguishes the debt of the corporation to the amount of the debt so taken up, and extinguishes the amount of his own liability to the extent of the sum so paid by him. *Ganch v. Harrison*, 12 Brad. 457; *Thompson v. Meisser*, 108 Ill. 359.

A debtor may pay his debt, but he can not purchase it, so as to present it as a living chose in action against himself, to share in the assets with other creditors. *Edison Electric & L. Co. v. DeMott*, N. J. case, *Chicago Legal News*, June 3, 1893, p. 341.

If the stockholder is permitted to take a part of such fund, viz., his liability, and with it purchase at a discount from the creditors of the insolvent bank, the bank's liabilities, and turn the same in at their face value for such stockholder's benefit, then it seems to us that the object of the statute would be defeated.

As is said in the case of *Thompson v. Meisser*, 108 Ill., at p. 368, "What advantage would the statute be to the outside creditors?" We do not understand that these stockholders, after the failure of the bank to pay its debts, stood

in the relation of sureties or guarantors of the bank, in the sense that they could utilize the debt of the bank so paid by them, as claims against the bank, the same as other and outside creditors.

We understand the payment of such a debt by a stockholder is the payment by him of an original liability, and therefore as completely an extinguishment of it, as if paid by the bank itself.

While it is true, the stockholder does not become liable until the bank has failed to pay its debt, yet when that condition arises, then the protection of the corporation, to the extent of the face value of his stock, is withdrawn by the law, and his liability as to such debt, by operation of law, becomes that of a partner. Therefore, *such* debt, as between the stockholders and such creditor, is in law, as if directly contracted, *originally*, between such creditor on the one hand and such stockholders, as partners, on the other, regardless of the fact that there ever was a corporation.

We understand the case of *Fuller v. Ledden*, 87 Ill. 310, which has since been several times approved, expressly so holds. See *Buchanan v. Meisser*, 105 Ill. 638, 643.

If this view of ours of the law, is correct, then it certainly follows that partners can not purchase their own debts; they can only pay them. It also follows, that the legal effect of the acts of these defendants in error, in taking up these certificates of the bank's indebtedness, was to pay and extinguish them, so far as the other creditors were concerned.

These views are expressed as to these certificates on the hypothesis of the facts in this case, that the money actually paid by these stockholders did not in any case exceed the amount of their individual liability, as evidenced by the shares of stock held by them respectively.

We are constrained to reverse this case, with directions to dismiss the proceedings of the defendants in error in the court below.

Reversed with directions.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1893.

Mueller v. United States Mutual Accident Association.

1. **INSURANCE COMPANIES—Forfeiture of Policies—Notice.**—A certificate of insurance in a mutual accident association contained a clause providing that if an assessment "be not paid before its expiration, this certificate and all insurance thereunder will then cease to be in force." One of the by-laws of the association provided that "a member who shall not remit the amount of his assessment or annual dues within thirty days from the day of the notice thereof, shall forfeit his claim to membership and have his name stricken from the roll." *It was held* that the notice to a member, if it is sought to forfeit his policy, must be such a one as the member is required by the by-law to obey.

2. **NOTICE BY MAIL—What is "the Day of Notice."**—Under the by-law of a mutual accident association a member was required to remit within thirty days from the day of the notice. *It was held* that "the day of the notice," when sent by mail, is the day when in due course of mail it would reach the member, and he may remit without forfeiture of his rights on the last day of the thirty mentioned in the notice.

3. **FORFEITURE—Burden of Proof.**—When an association claims a forfeiture of a member's rights by reason of his non-compliance with a notice, it must show that the member was notified in the manner prescribed by the by-laws. It is no answer to objections to a notice that the conduct of the member probably would have been the same if the notice had been unobjectionable.

4. **FORFEITURE—Waiver of.**—An insurance association can waive a forfeiture, if one has been incurred.

Memorandum.—Assumpsit. In the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Declaration on a certificate of insurance; plea, general issue; trial by jury; verdict for

Mueller v. U. S. Mutual Accident Ass'n.

plaintiff; motion for a new trial granted; cause then submitted to the court upon an agreed statement of facts; finding for defendant; appeal by plaintiff. Heard in this court at the March term, 1893, and reversed. Judgment entered in the Appellate Court. Opinion filed August 4, 1893.

The opinion states the case.

APPELLANT'S BRIEF, RUBENS & MOTT, ATTORNEYS.

There is nothing in the charter or by-laws which will make the record of the society as to the levying of an assessment *prima facie* evidence of the legality of such assessment. An insurance company, although a mutual company, must show a strict compliance with all the conditions precedent to the levying of an assessment. May on Insurance, 3d Edition, Sec. 557; Bacon on Benefit Societies, Sec. 377; Niblack on Mutual Benefit Societies, Secs. 277-279.

No forfeiture can be established except for a violation of the precise conditions laid down. Bates v. Association, 51 Mich. 587.

Wherever a notice is requisite, either by statute or by-law, to permit of any summary proceeding for the forfeiture of valuable rights, and especially property rights, the precise form of notice prescribed and the time and manner of giving it must be strictly observed; otherwise no forfeiture can be insisted upon. High on Extraordinary Legal Remedies, Sec. 295; Sands v. Sanders, 26 N. Y. 240; Castner v. Insurance Co., 50 Mich. 273; Sands v. Graves, 58 N. Y. 98; Sands v. Shoemaker, 4 Abbott App. (N. Y.) 149; Haywood v. Collins, 60 Ill. 328; Carney v. Tully, 74 Ill. 375; Chicago & A. R. R. Co. v. Smith, 78 Ill. 96.

The retention by the company of the one dollar balance of deposit account is inconsistent with and is a waiver of any forfeiture.

The company applied this one dollar toward the payment of the annual dues of the year 1888. The policy was declared forfeited December 28, 1887. No part of this one dollar had therefore been earned by the company. It could not claim that the policy was forfeited and void as to the insured, but was valid and subsisting for the purpose of allowing it to

retain unearned dues. If the company intended to insist upon a forfeiture it should have returned the one dollar. *Etna Ins. Co. v. Maguire*, 51 Ill. 351; *Peoria M. & F. Ins. Co. v. Botto*, 47 Ill. 519; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 235.

In cases of a forfeiture of a contract the parties must be put *in statu quo* by a return of whatever was received on the contract. *Buchenau v. Horney*, 12 Ill. 335; *Whitehall v. Smith*, 24 Ill. 166; *Tobin v. Western Mutual Aid Association*, 72 Ill. 261.

APPELLEE'S BRIEF, KNIGHT & BROWN, ATTORNEYS.

On the question that the notice began to run from the date of the mailing of the notice, appellee cited the following authorities: *Greeley v. Insurance Co.*, 50 Iowa, 86; *Yoe v. Benevolent Ass'n*, 63 Md. 86; *Epstein v. Insurance Co.*, 28 La. Ann. 938; *Ross v. Hawkeye Ins. Co. (Iowa)*, 50 N. W. Rep. 47; *Weakley v. Insurance Co.*, 19 Brad. 327; *Union Mutual Accident Ass'n v. Miller*, 26 Ill. App. 230; *May on Insurance*, Sec. 562.

The company was not bound to give notice of the annual dues. The payment of them is a part of the contract. *Ins. Co. v. Mowry*, 96 U. S. 544; *Roehner v. Ins. Co.*, 63 N. Y. 160; *Bacon on Insurance*, Sec. 360.

On the question that the company owing him anything from another fund, does not invalidate the notice, appellee cited the following cases: *Hollister v. Ins. Co.*, 118 Mass. 478; *Ancient O. U. W. v. Moore*, 1 Ky. L. R. 93.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant is the administrator of Agnes Scheel, who was the wife of Charles Scheel. By the appellee, Charles was insured against death by accident, the policy payable to her.

The only question is, whether Charles had forfeited his membership by the non-payment of an assessment.

The policy contained a clause that if an assessment "be not paid before its expiration, this certificate and all insurance thereunder will then cease to be in force."

Mueller v. U. S. Mutual Accident Ass'n.

One of the by-laws of the association provides that "any member who shall not remit the amount of his assessment or annual dues within thirty days from the day of the notice thereof * * * shall forfeit his claim to membership and have his name stricken from the roll."

All notices of assessments shown by this record, three in number, contain this:

"DEPOSITS FOR ASSESSMENTS.

To make sure that your membership will not lapse, keep a deposit with the association.

The system of deposit accounts adopted for the convenience of members, enabling them to remit for several assessments in advance, thus avoiding annoyance or the liability of forfeiture by neglect to remit, or by loss in the mails through remitting for single assessments as they are made, leads us to commend it to all members as the most desirable and advantageous plan.

The proportion of members who are now paying their assessments by the year is very rapidly increasing, the money being deposited in bank beyond any possibility of loss to the members.

Deposit receipts are given, and the member is kept fully apprised of all assessments made. The assessment notices when mailed, are stamped paid, charged against deposit account. We aim to give notice when same is exhausted."

No by-law relating to such deposits is shown, but the course of business and practice of the association is shown by the notices, and Charles Scheel had conformed to it by making one deposit of \$10 and another of \$5, out of which \$14 had been applied to assessments, leaving still with the association \$1. The by-laws provided that "each member shall pay the sum of \$1 annually in advance for dues. These dues shall be payable with the last assessment of each year."

The last assessment payable in the year 1887, was made November 28, 1887, and on that day was mailed in New York to Charles Scheel in Chicago, a notice which the record shows could not have reached him before November 30, 1887.

So much of that paper as constitutes the notice simply, is as follows :

“Office of the
UNITED STATES MUTUAL ACCIDENT ASSOCIATION,
320 and 322 Broadway, New York.
P. O. Box, 851.
Chas. B. Peet, President. James R. Pitcher, Secretary.
Calvin T. Hazen, Treasurer.
NEW YORK, November 28, 1887.

At a regular meeting of the board of directors, an assessment of two dollars upon each member in Division B, for conducting the business of the association, was ordered to be made, to expire thirty days from November 28, 1887, upon all members admitted prior to that date.

In accordance with the by-laws, the annual dues in advance are payable with this assessment, making a total amount due upon this notice of \$3.

Assessments and annual dues must be paid to the secretary at the office of the association, 320 and 322 Broadway, N. Y., within thirty days from November 28, 1887, and the association can not be legally held by payment to any one else.

The sending of this notice shall not be held to waive any forfeiture or lapse of membership by non-payment of previous assessments.

If you have a deposit account and this notice is stamped ‘paid, charged against deposit account,’ hold it as your receipt.

If not paid please return this blank with your full name and postoffice address, and enclose \$3 in payment of assessment No. 53, and annual dues.

Very respectfully,

JAMES R. PITCHER, Sec’y.”

Now that this notice was not such as Charles Scheel was required by the by-law to obey, must be conceded.

Under the by-law he was required to “remit,” * * * “within thirty days from the day of the notice.” “The day of the notice” is the day “when in due course of mail it

Mueller v. U. S. Mutual Accident Ass'n.

would reach" Charles Scheel. *Northwestern Travelling Men's Ass'n v. Schauss*, No. 4752, opinion filed June 14, 1893.

By the notice Charles Scheel was required to have the money at the office of the association in New York by December 28, 1887. Under the by-law he was entitled to remit December 30, 1887.

The notice cut off four days of his time.

Again, the association had \$1 of his money on deposit, and could only require \$2 instead of \$3 from him.

The association claims a forfeiture. "It must show that the member was notified in the manner prescribed by the by-laws." *Bacon, Benefit Societies*, Sec. 379.

And it is no answer to objections to a notice that the conduct of the member probably would have been the same if the notice had been unobjectionable. *Nat. Bk. of Rondout v. First Nat. Bk. of Chicago*, 37 Ill. App. 296; *Frey v. Wellington Mut. Ins. Co.*, 4 Ontario App. Rep. 293.

It is quite conceivable that Charles Scheel might not have received the notice until the 27th of December, 1887, or on some day between that day and the 31st, and then, though under the by-law he was still entitled to remit \$2 for his assessment, and under the usage of the company entitled to have the remaining \$1 of his deposit applied to his annual dues, yet being informed by the notice that \$3 were required of him, and that the time within which he might remit had passed, he might thereby have been misled, and so refrained from sending the \$2 on or before the 30th.

The indemnity to be paid by the association was conditioned upon the fact that the assured was at the time of his death a member. The payment of any particular assessment was not the consideration for the indemnity, but the non-payment of it might be a cause of forfeiture of membership.

It is not necessary to decide whether the by-law quoted is self-executing, or requires some action by the association before a membership is forfeited.

Certainly the association could waive the forfeiture, if one

VOL. 51.]

Mueller v. U. S. Mutual Accident Ass'n.

had been incurred. Metropolitan Accident Ass'n v. Windover, 137 Ill. 417.

And if a forfeiture was incurred the association has waived it.

December 29, 1887, which was one day before Charles Scheel should have been required to remit, the association sent him this notice:

"Office of the

UNITED STATES MUTUAL ACCIDENT ASSOCIATION.

320 and 322 Broadway.

P. O. Box 851.

Chas. B. Peet, President.

James R. Pitcher, Secretary.

Calvin T. Hazen, Treasurer.

NEW YORK, December 29, 1887.

At a regular monthly meeting of the board of directors, an assessment of \$2 upon each member in Division B, for conducting the business of the association, to expire February 1, 1888, was ordered to be made upon all members admitted prior to January 1, 1888.

Assessments must be paid to the secretary at the office of the association, 320 and 322 Broadway, N. Y., prior to date of expiration (February 1, 1888), and the association can not be legally held by payment to any one else.

The sending of this notice shall not be held to waive any forfeiture or lapse of membership by non-payment of previous assessments.

Your membership in this association having been forfeited by non-payment of the previous assessment, we send you this blank to notify you that if you are in sound bodily condition, and will remit to us \$2 for such assessment, we will, upon its receipt, re-instate you to membership, and you can then pay this assessment (No. 54) as per this blank, on or before the date of its expiration. If you prefer, you can remit now in full.

Please return this blank with your full name and post-office address, and enclose \$2 in payment of assessment No. 54.

Very respectfully,

JAMES R. PITCHER, Sec'y."

Beldam v. Lewisohn.

The inference from this notice is that the association regarded the annual dues for 1888, as being paid, and it is in the record "that the one dollar * * * was applied by the company in the payment of annual dues for the year 1888, and has been retained by the company." Thus at the same time that the association insists that Charles Scheel ceased to be a member by his default, it applies his money to the continuance of his membership for another year. Whether this last notice is good, is not a question now. Charles Scheel died from a cause within the policy, January 15, 1888, so that he could not be in default on the last assessment.

By reason of the defects of the notice of the assessment of November 28, 1887, no forfeiture was incurred by disregarding it; and had there been a forfeiture, it was waived; The appellant is therefore entitled to recover.

So much of this opinion as relates to the waiver, is concurred in by the other members of this court; that under the circumstances there was no cause of forfeiture, is my individual opinion.

The case was tried below without a jury. We will therefore enter judgment here. Union Nat. Bk. v. Manistee Lumber Co., 43 Ill. App. 525.

It is agreed that the amount, if anything, is \$4,000, with interest at six per cent from April 5, 1888.

The judgment is reversed and judgment entered here that the appellant recover as above.

Beldam et al. v. Lewisohn et al.

1. **VENDOR AND VENDEE—Partial Acceptance of Order—Recoupment.**—Where a party ordered from an agent a quantity of merchandise, and the principal filled only a portion of the order, by shipping a portion of the merchandise, *it was held*, that as he received the order as a whole, he would be bound to fill it as a whole, and in an action to recover the price of the quantity shipped, the defendant might recoup whatever damages he sustained by reason of the plaintiff's failure to fill the entire order.

2. RECOUPMENT—*Under the General Issue.*—Damages may be recouped under the general issue. Special pleas are not necessary.

Memorandum.—**Assumpsit.** In the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Trial by the court; finding and judgment for plaintiff; defendant appeals. Heard in this court at the March term, 1893. Reversed and remanded. Opinion filed April 19, 1893.

The opinion states the case.

E. A. ABORN and H. T. & L. HELM, attorneys for appellants.

MOSES, PAM & KENNEDY, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

November 15, 1889, one W. H. Sills applied to the appellants to order through him, as a broker, goods from appellees. Sills testified that he had his authority to sell from one Parker, from whom he was to receive ten per cent commission. Other evidence showed that he was to divide this commission with the appellants.

The appellants gave to Sills the same day, two orders, as follows:

“OFFICE OF THE M. A. RICHARDSON CO.

Manufacturers of Pieced, Stamped, and Japanned Tinwares,
Hardware Specialties, 75 and 77 Lake Street.

Chicago, Nov. 15, 1889.

W. H. Sills:

DEAR SIR: Please order for us the following, to be shipped one-third in thirty days; one-third in sixty days; one-third in ninety days:

600, $10\frac{1}{2}$ x $18\frac{1}{2}$ oval copper flat bottoms; 3,000, $10\frac{1}{2}$ x 21 oval copper flat bottoms; 3,000, 12 x $22\frac{1}{2}$ oval copper flat bottoms; 1,500 No. 7 round pit $9\frac{1}{2}$ inch bottoms; 3,000 No. 8 round pit $10\frac{1}{2}$ inch bottoms; 600 No. 9 round pit $11\frac{1}{2}$ inch bottoms; 2,000 $6\frac{1}{2}$ inch circles. All to be not heavier than 11 oz. copper, price 24 cts. per lb. with $7\frac{1}{2}$ per cent off.

150 $13\frac{1}{2}$ x $23\frac{1}{2}$ oblong square; 100 12 x 22 oblong square. 14 oz. copper, price 22 cts. $7\frac{1}{2}$ per cent off, Chicago delivery.

Beldam v. Lewisohn.

600 $10\frac{1}{2}$ inch circles; 300 $11\frac{1}{2}$ inch circles; 1,800 $4\frac{1}{2}$ inch circles. 11 oz. same as above, at 24 cts.

The above price of 22 and 24 to be guaranteed against a decline in the market. If a decline, we to still have the advantage of the $7\frac{1}{2}$ per cent.

THE M. A. RICHARDSON CO.

“OFFICE OF THE M. A. RICHARDSON CO.,
Manufacturers of Pieced, Stamped and Japanned Tinwares,
Hardware Specialties, 75 and 77 Lake Street.

Chicago, Nov. 15, 1889.

“W. H. Sills:

DEAR SIR—Please order for us: Six cases 14 x 48 cold, rolled bright copper, 12 oz., at 24 cents, 8 cents for retinning and $7\frac{1}{2}$ per cent off, to be shipped same as other order of copper of this date.”

Sills the same day left at Parker's office (he being out) an order prepared by himself, as follows:

“Please send press copy of all shipments on this order, inserting the number.

Order No. 1,029.

Chicago, 11 - 15 - '89.

W. H. Sills.

Sold for Messrs. Lewisohn Bros.

Sold to the M. A. Richardson Co., Chicago, Ill.

Terms, ———— Commission.

Please ship me one-third of my order as below in thirty days, one-third in sixty days, and one-third in ninety days: 600 only, $10\frac{1}{2}$ x $18\frac{1}{2}$ oval copper flat bottoms, 11 oz.; 3,000 only, $10\frac{1}{2}$ x 21 oval copper flat bottoms, 11 oz.; 3,000 only, 12 x $22\frac{1}{2}$ oval copper flat bottoms, 11 oz.; 1,500 No. 7, round pit, $9\frac{1}{2}$ inch copper flat bottoms, 11 oz.; 3,000 No. 8, round pit, $10\frac{1}{2}$ inch flat bottoms, 11 oz.; 600 No. 9, round pit, $11\frac{1}{2}$ inch flat bottoms, 11 oz.; 2,000 $6\frac{1}{2}$ inch circles, 11 oz.; 600 $10\frac{1}{2}$ inch circles, 11 oz.; 300 $11\frac{1}{2}$ inch circles, 11 oz.; 1,800 $6\frac{1}{2}$ inch circles, 11 oz.; 150 $13\frac{1}{2}$ x $23\frac{1}{2}$, oblong square, 14 oz.; 100 12 x 23, oblong square, 14 oz.; 6 cases 14 x 48 C. R., bright copper, 12 oz. Prices guaranteed.”

There is nothing to show directly that Parker ever saw the latter order, or that it ever came to the appellees, but

the fact is that, with no other communication with either Sills or the appellants, the appellees sent to the appellants the six cases, constituting the second order by the appellants and the last item on the order by Sills. As Sills kept the orders of appellants, and left at Parker's office only the order made by himself, it is the fair—indeed, the only legitimate—inference, that the appellees sent the goods which they did send, upon Sills' order.

The only evidence of the authority of Parker, is this extract from a letter from the appellees to the appellants:

"We have not been selling any goods through Mr. Sills—we do not know him, have never seen him, and have never authorized him to sell anything for us. We employed a young man by the name of Parker. The only sale which he reported to us, as made to you, we have completely filled, and on receipt of this order we immediately notified you of its acceptance, sent it to our mill, and thus executed the entire and only order we received."

There is no extrinsic evidence of the truth of any of the statements in that letter.

Now it is certain, considering only the evidence in this record, that the appellants bought no goods from the appellees, except upon the terms of the order left by Sills at Parker's office. Nothing else is shown which could have induced the sending of any goods.

If the appellees accepted that order, they must take it as it is—all or none. If Parker did not report the whole of it, his default is theirs; he was their agent. So far as concerns the appellants, the sending of the goods upon an order left with Parker, is the same as sending them upon an order delivered to the appellees personally.

The appellees sued for goods sold and delivered; the appellants sought by pleas and evidence to recoup the damages they had sustained by the refusal of the appellees to fill the whole order and the rise in copper. The pleas were useless; recoupment is under the general issue. *Wadhams v. Swan*, 109 Ill. 46; *Tully v. Excelsior*, 115 Ill. 544.

The court struck out all of the appellants' evidence and

Weigley, Bulkley & Gray v. The People.

rendered judgment for the full amount of the appellees' claim.

The very voluminous brief of the appellees contains a good deal of harsh language, which reads well, but is not convincing.

They report the judge below as saying, "I think, having taken the last item in the order and filled it, if they received it as a whole, they would be bound by it, and the defendant would be entitled to recoup whatever damages he sustained."

We agree to that, and only differ from him by holding that as the evidence shows no reason why the appellees sent any goods to the appellants, other than that an order for those sent and those not sent, was left at the office of their agent, it must be inferred that such as were sent, were in acceptance of the order for the whole.

The judgment will be reversed and the cause remanded.

WATERMAN, J., dissents.

Weigley, Bulkley & Gray v. The People of the State of Illinois.

Ames v. Same, in the Matter of Jacob Graff v. Northwestern Shoe Company.

1. CONTEMPT OF COURT—*Void Order*.—Upon a bill being filed in the Superior Court of Cook County by a stockholder of a corporation having its principal office and doing business in another county, a receiver was appointed. Some days after, appellants, W., B. & G., as attorneys, recovered a judgment against the corporation, and, still later, had issued an execution, which they caused to be put into the hands of the sheriff of the other county, and levied upon goods of the corporation, but not in the possession of the receiver. The court ordered the sheriff to turn the goods over to the receiver, but, under the advice of W., B. & G., he declined to do so. On an attachment for contempt, *it was held* that neither W., B. & G., nor the sheriff, not being parties to the suit in which the order was made, could have appealed therefrom. When the court attempted to enforce obedience to its order by proceedings for contempt, an appeal might be taken, or a writ of error would lie. On the reviewing of this, the propriety of the former order could be considered.

51	51
51	417
51	51
55	387
51	51
155	491
51	51
60	425
51	51
62	598
51	51
64	276

VOL. 51.]

Weigley, Bulkley & Gray v. The People.

2. CONTEMPT OF COURT—*Disobedience of an Unauthorized Order.*—Where a court of equity has no jurisdiction of the subject-matter, or authority to grant the relief prayed for in a bill, a person not a party to the suit, can not be held in contempt for disobeying its orders made in the course of the proceedings.

Memorandum.—Criminal law. In the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding. Proceedings for contempt of court. Two cases. Writ of error and appeal. Heard in this court at the March term, 1898, and reversed. Opinion filed April 6, 1898.

BRIEF FOR APPELLANTS AND PLAINTIFFS IN ERROR, WEIGLEY,
BULKLEY & GRAY, ATTORNEYS.

The Superior Court had no jurisdiction to appoint a receiver for Northwestern Shoe Company, located in another county.

Chapter 22, section 3, of the Revised Statutes of Illinois provides:

“Suits in chancery shall be commenced where the defendants, or some one or more of them, reside; or, if the defendants are all non-residents, then in any county; or, if the suit may affect real estate, in the county where the same or some part thereof is situated. Bills for injunctions to stay proceedings at law shall be brought in the county in which the proceedings at law are had.”

The filing of the bill in Cook county was a violation of the statute. The statute is mandatory. The language of it is “shall.” The Superior Court of Cook County is, therefore, without jurisdiction in the premises, and its orders are void. *Johnson v. Gibson*, 116 Ill. 294; *Ralston v. Hughes*, 13 Ill. 470; *McDonald v. Asay*, 37 Ill. App. 469; *Richards v. Hyde*, 21 Ill. 640.

A court of equity has, in the absence of statutory power, no jurisdiction over corporations, for the purpose of decreeing their dissolution and the distribution of their assets among individual corporators, at the suit of one or more of the stockholders. *Cook on Stock and Stockholders*, 2d Ed., Sec. 629; *Hardon v. Newton*, 14 Blatch. 376; *Merriman v. Carroll*, 4 Am. Ry. & Corp. Law Jour. 12; *Hinkley v.*

Weigley, Bulkley & Gray v. The People.

Pfester (Wis.), 53 N. W. Rep. 21; *People v. Erie Ry. Co.*, 36 How. Pr. Rep. 129.

The bill is a suit to wind up the corporation and distribute its assets, both real and personal, among the creditors and stockholders; in other words, it is a bill for partition, and must be brought in the county where the land and personal property is located, as much as though it were a bill for the partition of real estate direct.

The same principle is followed, and the same doctrine held by the courts of New York. It is there held that an action brought for the recovery of land or the title thereto must be brought in the county in which the land, or some part is situated. *Ring v. McCoun*, 3 Sandford (N. Y.), 524; *Wood v. Hollister*, 3 Abb. Pr. 14; *Newton v. Bronson*, 13 N. Y. (3 Kern) 57; *Starks v. Bates*, 12 How. Pr. 465.

And in Kentucky, it is held that where the jurisdiction of the court is merely co-extensive with the county where land is to be subjected, suit must be brought in the court of the county where the land is situated. *Milwart v. Lair*, 13 B. Mon. 207; *Savary v. Taylor*, 10 B. Mon. 334.

If, therefore, jurisdiction in the case at bar is limited to the courts of the county of Boone, then no other county would have jurisdiction. Thus Probate and Surrogate Courts are usually limited in their jurisdiction by statute. The statute usually provides that a man's estate be administered in the county in which he resided at the time of his death. Administration in any other county would be void. *Freeman on Void Judicial Sales*, Secs. 2, 3 and 4.

The process, order or decree must be within the authority of the tribunal, and otherwise valid, else a disregard of it will be no contempt. *Bishop on Criminal Law*, Vol. 2, Sec. 256; *Birdsall v. Pixley*, 4 Wend. 196; *People v. Brennan*, 45 Barb. 344.

It is not contempt to disobey the order of a court having no jurisdiction. *Am. and Eng. Ency. of Law*, Vol. 3, p. 788. *In re Morton*, 10 Mich. 208; *Sherwin v. People*, 100 N. Y. 351; 10 Fed. Rep., note on page 629; *People v. Sturtevant*, 5 Seld. 263; *People v. O'Neil*, 47 Cal. 109; *Rex v. Clement*, 4 Barn. and Ad. 218.

Where a court exceeds its jurisdiction, a party can not be punished for contempt for violating its order. *People v. O'Neil*, 47 Cal. 109; *Ex parte Grace*, 12 Ia. 208.

No one can be punished for contempt for disobeying a void order. *Brown v. Moore*, 61 Cal. 432; *Perry v. Mitchell*, 5 Denio (N. Y.) 537; *U. S. Trust Co. v. N. Y., W. S. & B. Ry. Co.*, 67 How. Pr. 390.

BRIEF OF DEFENDANT IN ERROR AND APPELLEES, MOSES, PAM
& KENNEDY, ATTORNEYS.

It was contended for the defendant in error and the appellees that the court had jurisdiction, citing *Enos v. Hunter*, 4 Gil. 211; *Ralston v. Hughes*, 13 Ill. 469; *Kennedy v. Greer*, 13 Ill. 432.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

September 9, 1892, Jacob Graff filed a bill in the Superior Court, stating that he was a stockholder in the Northwestern Shoe Company, a corporation at Belvidere, in Boone County, Illinois, and in substance that the corporation was in pecuniary difficulties, its property being attached, its business stopped, and that unless a receiver was appointed to conduct its business, its assets would be sacrificed, title to property which it held upon condition of continuing business forfeited, and the plant go "to wreck and ruin," so that the complainant would get nothing for his stock; all of which evil consequences might be avoided by conducting the business through a receiver until the stock of goods, raw material, and credits of the corporation could be converted into cash, and applied to the payment of its debts.

On the same day the bill was filed, the corporation appeared and consented to the appointment of Robert W. Wright, of Belvidere, as receiver, and the court appointed him.

September 20, 1892, Chick Brothers, for whom Weigley et al., were attorneys, recovered in the Circuit Court of Cook County, a judgment against the corporation, and September 27, 1892, an execution upon that judgment was, by

Weigley, Bulkley & Gray v. The People.

direction of Weigley et al., as such attorneys, levied by Ames, who was sheriff of Boone county, upon some boots and shoes of the corporation, which were in the freight house of the North Western Railway at Belvidere.

Some question is in the case as to what the receiver had done about these boots and shoes, but we regard it as immaterial.

Weigley et al., and Ames, knew before the levy, that Wright had been appointed receiver.

It is not necessary to state at length the proceedings which ended in orders for attachments of Weigley et al., and Ames, for contempt of the court in refusing to obey the order of the court to surrender to the receiver the boots and shoes levied upon, to reverse which orders this appeal and writ of error are prosecuted.

There are many cases which hold that where the property rights of a private corporation are involved or threatened, and the governing power of the corporation, upon the application of a stockholder to that power to seek a remedy in equity, refuses so to do, he may go into equity, stating such refusal and the grievance, and obtain relief. *Morawetz on Corp.*, Sec. 241. But such application and refusal are conditions precedent (*Ibid.*) and it needs no authority that even in such case the relief must be such as the corporation is itself entitled to.

A corporation is entitled to no greater protection of its property than an individual, and was it ever held that either a corporation or an individual was entitled to the protection of a court of equity against the process of the law to collect debts, because of the effect upon the prosperity of the debtor? Under an assignment for the benefit of creditors under the statute, or upon a bill filed for a dissolution of a copartnership, or upon a bill by a creditor of a corporation, under section 25 of the statute concerning corporations, where assets are under judicial control for ratable distribution among creditors, stringent measures to prevent interference have been sanctioned.

Sercomb v. Catlin, 128 Ill. 556, 30 Ill. App. 258, is an

extreme instance, and however arrogant and despotic in its tone, the quotation from the Rhode Island court, made by us in 30 Ill. App. 261, is doubtless good law.

The question then is, had the Superior Court jurisdiction to make the orders to surrender possession of the goods levied upon, and the answer to this question depends upon the jurisdiction of the court over the subject-matter of the suit.

We lay out of view the allegation of the bill that the corporation had title to lands and buildings in Boone county, and that one object, not clearly stated, may be the ultimate disposition of that property, and also that the home of the corporation was there.

These objections, if valid, could perhaps be waived by the corporation as being in the nature of personal privileges. But this bill is a bold undisguised attempt to do what in *Robinson v. Raulston*, 33 Ill. App. 166, was attempted, under disguise, and condemned.

If the final dissolution of the corporation be considered as the object of the bill, the court had no jurisdiction. *Wheeler v. Pullman Iron & Steel Co.*, 32 N. E. Rep. 420, 43 Ill. App. 626, 143 Ill. 197, where the case was decided the same way upon other grounds.

And if the staying off of creditors be the subject of the bill, it is hardly possible that anybody would claim that a court of equity should do that. In any aspect of the case, the court had no jurisdiction of the subject-matter; no right, power or authority to grant the relief. This subject is one that often involves questions of great difficulty.

One who wishes to pursue it, can start with cases cited on page 411, in *Welch v. People*, 30 Ill. App. 399, and by following back from them, find great trouble in reconciling decisions.

But there remains this consideration: That in form a suit was pending in the Superior Court on the equity side, and in fact that court had appointed a receiver and directed the surrender of the goods; that however erroneous, that order should be obeyed; that the dignity of the court required obedience. It is common observation that stickling for dignity does not increase respect.

Orr & Lockett Hardware Co. v. Needham Co.

Neither Weigley et al., nor Ames, were parties to the suit, and had they been, could not have appealed from that order. "It was" their "privilege * * * either to obey the order, or stand in defiance of the power of the court. * * * When the court attempted to enforce obedience to its order * * * as for contempt of court * * * an appeal might be taken or * * * a writ of error would lie. * * * On the reviewing of such judgment of the court * * * the propriety of the preliminary or interlocutory order could be considered."

In *Lester v. Berkowitz*, 125 Ill. 307, and *Lester v. People*, 23 N. E. Rep. 387, the Supreme Court discharged Lester from the fine imposed for disobedience of the order which he attempted to have the court review in the first case. We are informed that this last case is still before the Supreme Court upon some application for rehearing, but whatever may be its authority as a final decision, it is the expression of an opinion once entertained by the Supreme Court, that one may safely disobey an "unauthorized" order. In *Sercomb v. Catlin*, *supra*, this court and the Supreme Court both thought it necessary, in justifying the adjudication that Sercomb was guilty of a contempt, to also justify the order which he refused to obey.

We do not, in reversing these judgments, trench upon the doctrine of *Berkson v. People*, No. 4436, this term. There the substance of the order disobeyed was right; if subject to criticism as to details, Berkson should have asked for a rectification of those details. The judicial department is the guardian of the property and liberty of the citizen; it should not transcend its power, and trespass upon them.

The orders or judgments adjudging the appellants and plaintiff in error guilty of contempt, are reversed.

Orr & Lockett Hardware Co. v. Needham Company et al.

1. PLEADING—*Allegations of Ownership*.—An allegation in a petition for a mechanics' lien, where parties other than the owner of the premises are made defendants, that such parties "have or claim some inter-

51	57
50	513
51	57
58	418
51	57
62	154

VOL. 51.] Orr & Lockett Hardware Co. v. Needham Co.

est" in the premises, is not an admission that they have any interest; the burden is upon them to show their interest.

2. **MECHANICS' LIEN**—*Merchants Furnishing Materials*.—Section 35 of the lien law (Chap. 82, R. S.) requiring the original contractor to furnish a statement of the number of persons in his employ, etc., whether as amended June 22, 1891, or before being amended, has, and had, no reference to a merchant supplying materials. So where a corporation supplying steel beams for a modern building claims a lien, it is not necessary for it to copy its pay roll of thousands of employes in a statement, and give it to the owner of the building.

3. **MECHANICS' LIEN**—*Statement Under Section 4*.—A compliance with section 4 of the lien act (Chap. 82, R. S.) providing for the filing of a statement in the office of the circuit clerk is not necessary except for the protection of creditors, incumbrancers or purchasers, named in section 28.

Memorandum.—In chancery. In the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Appeal from a decree sustaining a demurrer to petition for a mechanics' lien and dismissing the same for want of equity. Heard in this court at the March term, 1893. Reversed and remanded. Opinion filed July 12, 1893.

The opinion states the case.

APPELLANT'S BRIEF, H. C. BENNETT AND W. A. PHELPS,
ATTORNEYS.

We think it clear that section 35 of the lien act can not bear any such construction; besides, the Appellate Court in *Maxwell v. Koeritz*, 35 Ill. App. 300, in discussing the meaning of the word "creditor" as used in section 4, and whether it applies to sub-contractors, uses the following significant words:

"The word creditor, as used here, is somewhat ambiguous. It might be used to describe a sub-contractor, or it might mean one who has agreed with the owner of the premises to furnish material only, without performing any labor on the improvement; one who sells building materials, but does nothing else toward the erection of the improvement, is commonly regarded as a merchant or dealer, and not as a contractor."

The statement of lien filed with the clerk, under section 4, is good.

The sufficiency of such a statement must necessarily speak

Orr & Lockett Hardware Co. v. Needham Co.

for itself. There is no prescribed form; the test ought to be, does it fairly give notice to the public and to persons dealing with the property, that there is a claim of lien on the property, giving name of the claimant, items of material furnished, dates when furnished, amount claimed, description of the property, names of the owners, and duly verified. It would seem that such a statement ought to be held good and sufficient, and while material and mechanics' lien claims are strictly construed, they should not receive such a technical scrutiny as to defeat or destroy the remedy intended. *Stout v. Sower*, 22 Ill. App. 65.

APPELLEE'S BRIEF, HIRAM HOLBROOK ROSE, ATTORNEY.

A petition for a mechanics' lien by an original contractor can not be sustained unless he has complied with the provisions of the lien law. *Curran v. Smith*, 37 Ill. App. 69; *Barton v. Steinmiz*, 37 Ill. App. 141; *Floyd v. Rathledge*, 41 Ill. App. 370.

It is immaterial that this proceeding is between the contractor and the owner only; the statute declared that the contractor should have no right of action or lien until the statement provided for should be filed. A mere failure to call for such a statement can not be considered as a waiver of an obligation resting upon the contractor and an imperative requirement for a right of action. *Burnside v. O'Hara*, 35 Ill. App. 150; *Bonheim v. Meany*, 43 Ill. App. 533; *Wieska v. Imroth*, 43 Ill. App. 357.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an appeal from the decree of the Circuit Court, sustaining a demurrer to, and dismissing for want of equity, a petition for a mechanics' lien filed by the appellant against the appellees.

The Needham Company is sued as owner, with whom the contract was made, and the only showing of any interest in the premises by the other appellees, is the averment in the petition that they "have or claim some interest." Such an averment is no admission that in fact they have any interest; the burden is upon them to show it.

Section 35 of the lien act, whether as amended June 22, 1891, or before being amended, has and had no reference to a merchant, as in this case, supplying materials only. If a corporation supplying steel beams for a modern building claim a lien, can it be necessary for the corporation to copy its pay roll of thousands of employes in a statement, and give it to the owner of the building? The manifest object of that section is only that the owner may have notice of all persons who might themselves assert a lien.

That the statement or claim filed in the attempted compliance with section 4 is not good, may be conceded, but as no compliance with section 4 is necessary, except for the protection of persons named in section 28, the question of its sufficiency does not arise until it appears that there are such persons. The subject has been recently discussed here in *Moore v. Parrish*, 50 Ill. 233.

The appellees make no other question as to the right of the appellant to a lien, than neglect to comply with sections 4 and 35, and upon that, on the facts now shown, they are wrong.

The decree is therefore reversed and the cause remanded.

Knickerbocker Ice Company v. Kirkpatrick et al.

1. **MECHANICS' LIEN**—*A Statutory Remedy*.—As a mechanics' lien and the manner of its enforcement are purely matters of statutory regulation, the statute must be complied with.

2. **MECHANICS' LIEN**—*A Statutory Remedy—Application of the Law*.—The Knickerbocker Ice Company furnished brick, lime and cement to one Rogan for a building, which Rogan, under a contract with Kirkpatrick, built for him. The company served a notice upon Kirkpatrick pursuant to Sec. 30 of chapter 82, R. S., entitled "Liens," and the next day filed his petition for a lien. Section 37 of the same act provides that "if the money due to the person giving such notice shall not be paid within ten days after service thereof, or within ten days after the money shall become due and payable, and if any money shall then be due from such owner to the original contractor, such person may file his petition and enforce his lien," etc. *It was held*, that the petition was prematurely filed.

Knickerbocker Ice Co. v. Kirkpatrick.

Memorandum.—Mechanics' liens. In the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Petition for lien; answer; hearing upon demurrer; petition dismissed; appeal by petitioner. Heard in this court at the March term, 1893, and affirmed. Opinion filed August 4, 1893.

The opinion states the case.

ISRAEL COWEN, attorney for appellant.

APPELLEES' BRIEF, FRANK F. DOUGLASS AND A. B. JENKS,
ATTORNEYS.

The law is well settled that the statute which gives a mechanic or sub-contractor a lien is in derogation of the common law, and must be strictly construed, and no person can have a lien under it unless a clear compliance with the requirements of the statute is shown. *Butler & McCracken v. Gain*, 128 Ill. 27; *Belanger v. Hersey et al.*, 90 Ill. 70.

The statute does not give to a sub-contractor a lien absolutely, without notice to the owner of the rights of such sub-contractor, and a sub-contractor claiming a lien must give the owner notice, when the owner has not received the sworn statement from the original contractor. *Butler & McCracken v. Gain*, 128 Ill. 27.

The thirty-seventh section of the statute relating to mechanics' liens is as follows: "If the money due to the person giving such notice shall not be paid within ten days after service thereof, as aforesaid, or within ten days after the money shall become due and payable, and any money shall then be due from such owner to the original contractor, then such person may file his petition and enforce his lien, in the same manner as is hereinbefore provided in case of original contractors, or he may sue the owner and contractor jointly for the amount due him, in any court having jurisdiction of the amount claimed to be due, and a personal judgment may be rendered thereon, as in other cases."

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The case made by the appellant is that it furnished brick, lime and cement to one Rogan for a building that he, under

VOL. 51.] Postal Telegraph-Cable Co. v. W. U. Telegraph Co.

a contract with the appellee named above, built for her. That January 30, 1890, it served upon her a notice pursuant to section 30 of the lien act, and the next day filed this petition for a mechanics' lien.

The question is whether the suit is premature. Such a notice is a condition precedent to a lien by one who furnishes material to a contractor, except in case the owner has received from the contractor a statement under section 35. If the owner has received such statement the statute does not, in terms, prescribe how or when the material man may enforce his lien, and we shall not attempt a solution of that question.

But where the notice is given, as was done here, section 37 provides that "if the money due to the person giving such notice shall not be paid within ten days after service thereof, * * * or within ten days after the money shall become due and payable, and any money shall then be due from such owner to the original contractor, then such person may file his petition and enforce his lien," etc.

If no money is then, but thereafter becomes due to the original contractor, another question may arise, not presented by this record, as to when the petition may be filed.

The alternative of ten days after notice, or ten days after due, is for the ease of the owner; that he shall have ten days, at least, in which to pay, and if the money is not due from the contractor when the notice is served, then ten days after it is due. The petition was filed too early.

As the lien and the manner of its enforcement are purely matters of statutory regulation, the statute must be complied with. The decree dismissing the petition is affirmed.

51	62
155	335
51	62
63	355

Postal Telegraph-Cable Company v. Western Union Telegraph Company.

1. COVENANTS—*Running with the Land*.—Where the owner of a building leased certain rooms in it to a telegraph company for six years and covenanted not to lease rooms in the building to any other tele-

Postal Telegraph-Cable Co. v. W. U. Telegraph Co.

graph company to use as a telegraph office, without the consent of the lessee, and afterward sold and conveyed the whole building to another telegraph company subject to the lease, *it was held*, that the covenant in the lease was not one running with the land and was of a class not to be extended by construction.

Memorandum.—Chancery. In the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Jr., Judge, presiding. Bill for injunction; dismissed for want of equity; appeal by complainants. Heard in this court at the March term, 1893, and affirmed. Opinion filed April 6, 1893.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Circuit Court of Cook County, dismissing appellant's bill of complaint for want of equity. Appellant leased from the Phenix Company the northeast corner of the basement of the Phenix building, situated at the southwest corner of Clark and Jackson streets, in the city of Chicago, to be used as its general receiving and delivery office, for a term of six years, beginning May 1, 1892. The lease contained the following covenant: "During said term the lessor will not lease offices in said building to any other telegraph company, for use as a telegraph office, without consent of the lessee." Appellee, the Western Union Telegraph Company, with full knowledge of this lease, purchased the building from the Phenix Company, and was about to take possession and establish its general offices in the building, and to use the northwest corner of the basement as a general receiving office. The bill was filed to enjoin such use. To this bill the Phenix Company filed a general demurrer for want of equity. The Western Union Company filed an answer which contained a general demurrer. The court sustained the demurrer of the Phenix Company, and the motion for an injunction against the Western Union Company being heard upon the original and supplemental bills, the answer of the Western Union Company, and affidavits in support of the bills and answer, the injunction was refused. The court finding that the only relief sought by complainant was an injunction, dismissed the bill for want of equity, to reverse

VOL. 51.] Postal Telegraph-Cable Co. v. W. U. Telegraph Co.

which decree, so far as concerns the Western Union Company, this appeal is prosecuted.

APPELLANT'S BRIEF, J. L. HIGH, ATTORNEY.

The doctrine is now well established, both in England and in America, that where premises are leased with a restrictive covenant upon the part of the lessor limiting or restricting the use of such premises, or giving the lessee their sole use to the exclusion of any business which may interfere with his own, equity will enjoin a breach of such covenant by the lessor or his assigns. The jurisdiction of equity in this class of cases is based upon the inadequacy of the legal remedy, the prevention of irreparable injury and a multiplicity of suits, and the right of the lessee to be protected in the exclusive use and enjoyment of the premises, *modo et forma*, as covenanted in the lease. Kerr on Injunctions, 396-400, and cases cited; Altman v. Royal Aquarium Society, 3 Ch. D. 228; Tulk v. Moxhay, 2 Ph. 774, affirming S. C., 11 Beav. 571; Jay v. Richardson, 30 Beav. 563; Nicholson v. Rose, 4 De Gex and J. 10; Rankin v. Huskisson, 4 Sim. 13; Frogley v. Earl of Lovelace, John. 333; Manhattan Manufacturing Co. v. New Jersey Stock Yards Co., 8 C. E. Green 161; Kirkpatrick v. Peshine, 9 C. E. Green 206; Western Union Telegraph Co. v. Rogers, 42 N. J. Eq. 311.

Upon similar grounds equity will, at the suit of a lessor or his assigns, enjoin the lessee or his assigns from the violation of covenants in the lease restricting the use and mode of enjoyment of the demised premises, the principles upon which the relief is granted in both classes of cases being the same. Clegg v. Hands, 44 Ch. D. 503; Luker v. Dennis, 7 Ch. D. 227; Barret v. Blagrove, 5 Ves. 555; Tod-Heatly v. Benham, 40 Ch. D. 80; Kemp v. Sober, 1 Sim. N. S. 517; Stees v. Kranz, 32 Minn. 313; Wilkinson v. Rogers, 12 W. R. 284; Bray v. Fogarty, 1 R., 4 Eq. 544; Parker v. Whyte, 1 Hem. & M. 167; S. C., 32 L. J. Ch. 520; Evans v. Davis, 10 Ch. D. 747; Mason v. Mason, Flan. & K. 429; Mander v. Falcke (1891), 2 Ch. 554.

The covenant runs with the land, and binds subsequent purchasers. Complainant's lease being for a term of six

Postal Telegraph-Cable Co. v. W. U. Telegraph Co.

years is an estate for years and is, under the Illinois Statute, real estate instead of personalty, and subject to sale on execution. The covenant, being one which concerns the use and enjoyment in a particular manner of the demised premises, is inherent in the very estate granted. It is, therefore, a covenant running with the land, and complainant is entitled to the same relief against subsequent purchasers as against the original lessor. 1 Wood's Landlord and Tenant, 676 and cases cited; Taylor's Landlord and Tenant, 6th Ed., Secs. 261, 262, and cases cited; Spencer's Case, 5 Coke, 16; 1 Smith's Leading Cases, 9 Am. Ed. 174; Norman v. Wells, 17 Wend. 136; Clegg v. Hands, 44 Ch. D. 503; Wilkinson v. Rogers, 12 W. R. 284; Tatem v. Chaplin, 2 H. Bl. 133; Trustees of Watertown v. Cowen, 4 Paige, 510; Barron v. Richard, 3 Edw. Ch. 96; St. Andrew's Church's Appeal, 67 Pa. St. 512; Revised Statutes of Illinois, Chap. 80, Sec. 15.

It is, however, wholly immaterial whether the restrictive agreement is technically a covenant running with the land, since if it is regarded as a mere personal covenant of the lessor, subsequent purchasers with notice may be enjoined from a breach of the covenant. Tulk v. Moxhay, 2 Ph. 774, affirming S. C., 11 Beav. 571; Catt v. Tourle, L. R. 4 Ch. 654; Kirkpatrick v. Peshine, 9 C. E. Green, 206; Frye v. Partridge, 82 Ill. 267.

FRANK J. LOESCH, of counsel for appellant.

APPELLEE'S BRIEF, JOHN F. DILLON, RUSH TAGGART, AND WILLIAMS, HOLT & WHEELER, ATTORNEYS.

The construction of the covenant is the same in equity as at law. Chitty on Contracts (Ed. 1860), 77, 78, and cases cited; 2 Parsons on Contracts, *494 and note; Kerr on Injunctions, 2d Ed., 398-91.

The meaning of the covenant must be determined by what it says, and can not be enlarged by speculation or conjecture. Bast v. Bank, 101 U. S. 96; Field v. Mills, 33 N. J. L. 254; Consolidated Coal Co. v. Schmisser, 135 Ill. 371, 377.

VOL. 51.] Postal Telegraph-Cable Co. v. W. U. Telegraph Co.

Implied covenants are not favored. Wood's Landlord and Tenant (Ed. 1881), 521; Aspdin v. Austin, 5 Q. B. 671; Sharp v. Waterhouse, 7 E. & B. 816; Dunn v. Sayles, 5 Q. B. 685; Doe v. Guest, 15 M. & W. 160; Sheets v. Selden, 7 Wall. 416; 2 Woodfall, Landlord & Tenant, 675; Des Moines, etc., Ry. Co. v. Wabash, etc., Ry. Co., 135 U. S. 576.

The covenant, being in partial restraint of the beneficial use of property, will be strictly construed and not extended by implication. Taylor, Landlord & Tenant (5th Ed.), Secs. 402, 403, 406; 1 Washburn, Real Property (5th Ed.), *317; Lawson, Rights, Remedies and Practice, Secs. 2843, 2844; Livingston v. Stickles, 7 Hill (N. Y.) 253, and numerous cases therein cited; Field v. Mills, 33 N. J. L. 254; Brugman v. Noyes, 6 Wis. 1; 4 Kent (12th Ed.) *131; Fox v. Swann, Styles, 482; Gray, Restraints on Alienation, Secs. 4, 5.

The covenant is in its terms purely personal to the lessor, the Phenix Insurance Company. It does not relate to the demised premises, room A. It therefore does not bind the Western Union Company as assignee of premises not demised. 1 Washburn, Real Property (5th Ed.), *317; Seers v. Hind, 1 Ves., Jr., 294; Norcross v. James, 140 Mass. 188.

The covenant does not run with the land. Wiggins Ferry Co. v. O. & M. Ry. Co., 94 Ill. 83; Gibson v. Holden, 115 Ill. 199; Fitch v. Johnson, 104 Ill. 111; Transportation Co. v. O. R. Pipe Line Co., 22 W. Va. 600; Brewer v. Marshall, 19 N. J. Eq. (4 C. E. Green), 537.

The covenant, in express terms restricting only the right to lease offices in the building, does not attempt to limit and has not the effect of limiting, the use of the building by the owner for any purpose whatever. Kemp v. Bird, 5 Ch. D. 549; S. C. on appeal, 5 Ch. D. 974.

The complainant claiming the benefit of an implied covenant only, is not in any case entitled to an injunction, in the absence of irreparable damage. Consolidated Coal Co. v. Schmisser, 135 Ill. 371, 380.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The Phenix Insurance Company owned an office building, ten stories high, on the southwest corner of Clark and Jack-

Union Mutual Life Ins. Co. v. Kirchoff.

son streets, having a front of a little more than fifty feet on Clark street, and 216 on Jackson.

It demised to the appellant for six years from May 1, 1892, a room "known as No. A, in the east half of the street or basement floor," which occupied the whole Clark street front and about thirty feet on Jackson, and covenanted that "during said term the lessor will not lease offices in said building to any other telegraph company for use as a telegraph office without the consent of the lessee."

October 25, 1892, the Phenix Company conveyed the whole building, subject to "outstanding leases," to the appellee, which now intends to use part or all of the street floor not demised to the appellant, for a telegraph office in its own business. The appellant filed this bill to enjoin such use.

This covenant means what it says, in equity as well as law. Chitty, Cont., 104 Ed. 1874; Bishop, Cont. Sec. 427; 2 Parsons, Cont., 494; 2 Kent, Com., 554; Kerr, Inj., 389.

No ingenuity could frame a declaration in covenant, by which the use by the Phenix Insurance Company, or by any grantee of that company, as a telegraph office of any portion of the building not demised to the appellant, could be made a breach of the covenant copied.

The restraint goes no farther than the words extend it; it is as easy to conjecture that the Phenix Company would not have consented to any more, as that the appellant desired more. The covenant does not run with the land, and it is of a class not to be extended by construction. Norcross v. James, 140 Mass. 188, where a great deal of learning is collected.

The bill was properly dismissed and the decree is affirmed.

Union Mutual Life Ins. Co. v. Kirchoff.

1. RES ADJUDICATA—*Former Decisions in the Same Case.*—What has been decided by the Appellate Court on a former appeal, can not be reversed on a subsequent appeal in the same case.

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149s	536
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Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1898, and affirmed. Opinion filed August 4, 1898.

The opinion states the case.

FRANK L. WEAN, attorney for appellant.

HARBERT & DALEY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

On a former appeal this case is reported in 33 Ill. App. 607 and 133 Ill. 368. What was then decided can not now be reversed, and the reasons then given for such decisions, are on this appeal, the law of the case. *Dilworth v. Curtis*, 139 Ill. 508, and cases there cited, are but a few among many. We shall therefore omit any reference to matters of defense by the appellant, which if valid, existed before the first appeal. If we made a mistake, in which the Supreme Court concurred, or if better arguments can be now made for the appellant than were then made, the result can not be changed. The only question not open is upon the account as taken.

The appellant claims title under a tax deed, but as it acquired that title before the first hearing below, and even yet has never set it up in answer as a bar, its validity need not be considered.

On the last hearing the court found, and the evidence supports the finding, that the agreement under which the appellee is entitled to relief was made in August, 1878, and therefore in the account allowed to the appellant disbursements after that month. The appellee assigned that as a cross-error. Such allowance is somewhat inconsistent with the interest not beginning until September 10, 1879, but it is now too late to say that such interest should have begun a year earlier, as that date was fixed on the former appeal.

The appellant was not bound to do more than release the title to the appellee upon payment; all charges upon the land for taxes, etc., were her burden from the time the

Ligare v. Hayden.

agreement was made. As the appellant was not to covenant against anything, she was to take the land as it was.

It follows that everything paid by the appellant, after the agreement was made, in discharge of burdens upon the land, should be allowed to it in the account. But whatever the appellant had paid before the agreement was made ought not to be, and was not, allowed.

The \$10,000 was the price to the appellant of the interest of the appellant in the land as circumstances then were; that interest to be protected by the subsequent quit claim deed and the foreclosure.

The effect of the agreement between the parties as it was found to be, both by this court and the Supreme Court, was to apportion, of the total amount to which the appellant was entitled at the time the agreement was made, the sum of \$10,000, as the part to be paid in redemption of the land in controversy. There is no error and the decree is affirmed.

Ligare v. Hayden.

1. **GUARANTY—Implied Promises.**—Appellee sued appellant as maker of a promissory note, indorsed by the payee to the appellee, after it was due. Another note made by the payee and guaranteed by the appellant, was then lying, overdue and unpaid, in a bank. *It was held*, that there was an implied promise by the payee to indemnify appellant against the consequences of that guaranty, but until the appellant had been damaged, that implied promise could not be the basis of any defense to the note sued upon, whether it remained in the hands of the payee or was indorsed by him after maturity.

Memorandum.—Assumpsit. In the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Declaration, first indorsee against maker; plea, general issue; trial by jury; judgment for plaintiff; appeal by defendant. Heard in this court at the March term, 1893, and affirmed. Opinion filed June 29, 1893.

The opinion states the case.

C. C. BONNEY and LYMAN M. PAINE, attorneys for appellant.

APPELLEE'S BRIEF, FLOWER, SMITH & MUSGRAVE, ATTORNEYS.

On pleading a set-off, the defendant assumes the position of a plaintiff, and in order to recover he is required to prove the same facts which he would be required to prove if he had brought an original action on his demand. *Ellis v. Cothran*, 117 Ill. 458; *Ayres v. McConnel*, 15 Ill. 230.

A surety has no claim against the principal, until he has made payment. *Daniel on Negotiable Instruments*, Sec. 1339; *Brandt on Suretyship*, Sec. 205, and cases cited, especially *In re Estate of Hill*, 67 Cal. 238; *Lane v. Westmoreland*, 79 Ala. 372.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant as maker of a promissory note, indorsed by the payee to the appellee, after it was due. Another note, made by the payee and guaranteed by the appellant, was then lying overdue and unpaid in a bank.

The appellant insists that his then liability as guarantor for the payee is in some way a defense to this note. It was no failure of consideration, nor was it a set-off, nor payment.

There was an implied promise by the payee to indemnify the appellant against the consequences of that guaranty, but until the appellant had been damnified, that implied promise could not be the basis of any defense to the note sued upon, whether it remained in the hands of the payee, or was indorsed by him after maturity. *Brandt Sur. and Guar.*, S. 205; *Israel v. Reynolds*, 11 Ill. 218.

The statute, Sec. 12, Ch. 98, *Negotiable Instruments*, by which a set-off follows a note indorsed after maturity, has no effect here.

The judgment is affirmed.

Miner T. Knowlton v. Julia Knowlton.51 71
155 158

1. **DECREES—Finding of Service.**—Where, in a decree, the “court finds that said petition has been duly served on the” appellee, as the manner of service is shown by the record to have been by the publication of the order of the clerk, the finding by the court that the petition was “duly served,” is to be referred to the manner so shown.

2. **JUDGMENTS—Notice as to Other States.**—Whenever the validity of a judgment or decree of another State is in question, the courts of this State must take notice of the laws of the other State, so far as may be necessary to ascertain the faith and credit to be given to such judgment or decree, under the constitution and laws of the United States.

3. **DIVORCE—Foreign Decree.**—A sailor, whose domicile was in Connecticut, married a widow in Brooklyn, N. Y. They lived there together a short time, and then he sailed away, making provision, however, for her subsistence in Brooklyn during his absence. He afterward obtained a divorce in Connecticut, his petition containing an allegation that the wife was “in parts unknown.” The statute of Connecticut provides that, “On all petitions for a divorce where the adverse party resides out of, or is absent from the State, either judge of the Supreme Court of Errors, or of the Superior Court, or any clerk of said courts, or any county commissioner, may, in vacation, make such order relative to the notice to be given to the adverse party as he shall deem reasonable, and such notice having been given and duly proved to the court, said court may proceed to the hearing of said petition at the first term, or may direct such further notice to be given as said court shall deem proper.” *It was held*, that as she might easily, at the time of the divorce, have been found by the appellant in Brooklyn, and as it appeared that he knew it, the evidence would justify the court below in finding that for this fraud the decree of divorce was void.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1898, and affirmed. Opinion filed March 18, 1898.

B. M. MUNN, attorney for appellant.

CRAIG & SAMUELS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

A writ of error from an interlocutory decree in this case was here dismissed at the March term, 1891, 40 Ill. App. 588.

A large mass of testimony has since been taken on the

subject of the ability of the appellant to pay alimony, etc., but it is not abstracted, and we shall not consider it. *Truby v. Case*, 41 Ill. App. 153.

The real contest between the parties is as to the validity of a decree of divorce entered by the Superior Court of the State of Connecticut, in and for the county of Fairfield, on the 26th day of October, 1869, upon the petition of the appellant, dated October 4, 1869. That petition, which does not appear to have been sworn to, or supported by any affidavit, nor even signed by the appellant, but only by his attorney, contained an allegation that she was then "in parts unknown."

The clerk of that court then made an order of publication, which was complied with, and in the decree the "court finds that said petition has been duly served on the" appellee.

As the manner of service is shown by the record to have been by the publication of the order of the clerk, the finding by the court that the petition was "duly served," is to be referred to the manner so shown (*Hemmer v. Wolfer*, 124 Ill. 435), even when the decree is collaterally questioned. *Settlemier v. Sullivan*, 97 U. S. 444.

The record shows that both the appellant and the appellee, put in evidence here statutes of Connecticut, but the statutes so put in are only referred to in such a way that one having the books might find them, and are not copied in the record. That course does not help the court to consider the statutes cited, any more than would the reference to a book and page in the recorder's office as to a deed there recorded, bring the deed into the case.

But whenever the validity of a judgment or decree of another State is in question, the courts of this State must take notice of the laws of that other State, so far as may be necessary to ascertain the faith and credit to be given to such judgment or decree, under the constitution and laws of the United States. *Kopperl v. Nagy*, 37 Ill. App. 23.

The only statute of Connecticut to which the counsel of the appellant refers that is material, is as follows:

Knowlton v. Knowlton.

“Divorce Act: On all petitions for a divorce where the adverse party resides out of, or is absent from the State, either judge of the Supreme Court of Errors, or of the Superior Court, or any clerk of said courts, or any county commissioner may, in vacation, make such order relative to the notice to be given to the adverse party as he shall deem reasonable, and such notice having been given and duly proved to the court, said court may proceed to the hearing of said petition at the first term, or may direct such further notice to be given as said court shall deem proper.”

The appellant was a sailor in the service of the United States, and his domicile was in Connecticut when he was married. She was a widow, residing in Brooklyn, New York. They lived there together a short time, and then he sailed on a voyage, making provision for her subsistence in Brooklyn during his absence. That she might easily, at the time of the divorce, have been found by the appellant in Brooklyn, and that he knew it, the evidence would justify the court below in finding, and for aught that appears the court did so find, and acting on the authority of *Caswell v. Caswell*, 120 Ill. 377, for his fraud, held the decree of divorce void.

If so it be, it is to be disregarded. *Werner v. Werner*, 30 Ill. App. 159.

In the decree appealed from, it is found “that all the material allegations in the said second amended bill and the amendments thereto contained, are true as therein stated.”

Among those allegations is the fraud of the appellant, which avoids the jurisdiction of the Connecticut court.

Her second amended bill alleged that for more than three years immediately preceding the filing of his petition for a divorce, he was a citizen and resident of the city of Brooklyn, Kings county, New York.

That they were married in Brooklyn, September 18, 1866, and lived together there the residue of that year, or a little longer, is proved; when he sailed he left provision by which she would receive from the Navy paymaster, at Brooklyn, \$50 per month, and as she testified, before going he provided a flat and left her housekeeping with servants, and it appears

from his testimony that whatever the premises were that she called a flat they were in Brooklyn.

Before he went they had lived in those premises as a family by themselves, not boarding.

Now the fact that he established his wife in a home in Brooklyn, and left her there, is some evidence that he intended to change, and had changed, his domicile to Brooklyn, and therefore the court in Connecticut had no jurisdiction. Jacobs, Domicile, Sec. 401; 2 Bishop M. & D., Sec. 144.

The evidence from which his change of domicile is found may not be conclusive, nor very strong, but the court below had the witnesses present, and whatever may be the fact as to his domicile, there can be no doubt that he intended to, and did, steal a march upon her with a divorce suit of which he intended that she should have no knowledge.

Whether, if his domicile were in Connecticut, she can be allowed to treat the divorce as a nullity because of that fraud, or must be driven to a direct suit in the court that rendered the decree, to set it aside, is a question very difficult to decide; but if his domicile were not there, then there is no doubt.

We are not satisfied that any error was committed by the Circuit Court, and affirm the decree.

51	74
67	103
51	74
108	44

Jansen et al. v. Siddal.

1. PRACTICE IN APPELLATE COURTS—*Appeal to Supreme Court—Striking out Remanding Order.*—Where, by mutual request of the parties appearing of record, the remanding order of a case reversed was stricken out and the case taken by appeal to the Supreme Court, that court declines to examine the merits on such appeal.

Memorandum.—Appeal from the Superior Court of Cook County. Heard in this court at the March term, 1893. Reversed and remanded. Opinion filed February 14, 1893.

The opinion states the case.

MASON BROS., attorneys for appellants.

Hosher v. Hesterman.

T. W. BECKER, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

By mutual request of the parties appearing of record here the remanding order indicated by the report of this case in 41 Ill. App. 279, was stricken out and the case taken by appeal to the Supreme Court. That court declines to examine the merits on such appeal, and has remanded the case here with directions to either remand the cause for another trial or incorporate in our final judgment a finding of facts.

In obedience to those directions the cause is remanded, the judgment being reversed upon the opinion already filed and reported.

Hosher v. Hesterman.

1. **FORCIBLE DETAINER—*Appeal Bond in Five Days.***—In forcible detainer cases the bond on appeal must be filed within five days after the rendition of the judgment.

2. **ABSTRACT AND BRIEFS—*Failure to File in Time—Motion to Dismiss.***—A failure to file briefs and abstracts in time under the rule entitles the appellee to have the appeal dismissed, unless the delay is excused upon circumstances to be shown to the court.

Memorandum.—Forcible detainer. Appeal from the Circuit Court of Cook County. Heard in this court at the March term, 1893. Appeal dismissed. Opinion filed April 17, 1893.

The opinion states the case.

A. C. STORY, attorney for appellant.

WINSTON & MEAGHER, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant being plaintiff in an action of forcible detainer against the appellee in the Circuit Court, was defeated there and prayed an appeal to this court, which was allowed

and thirty days given him in which to file his appeal bond, and he did file it on the thirtieth day.

In this court, under the 27th rule, his abstract and brief were due April 3d, and he filed them April 6th.

In forcible detainer cases the bond on an appeal must be filed within five days after the rendition of the judgment; *Kenny v. Jones*, 37 Ill. App. 615; and the court could not enlarge the time; *Ibid.*, and see *Rozier v. Williams*, 92 Ill. 187, involving the same question in principle. See also *Fairbanks v. Streeter* (Ill.), 31 N. E. 494, 142 Ill. 226.

Neglect to file the abstract and brief entitles the appellee to have the appeal dismissed, "unless the delay is excused upon circumstances to be shown." Rule 27. No excuse is shown.

The appellee moved for the dismissal of the appeal on both grounds. The motion is granted, and the appeal dismissed.

Moore et al. v. Shoaff.

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55 347

1. **DAMAGES—Excessive—In Appellate Court.**—The question of excessive damages can not be raised for the first time in the Appellate Court. The attention of the court below must be called to the excessive verdict in order that it may have an opportunity to correct the error.

Memorandum.—Appeal from justice's court. In the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Trial by jury; verdict and judgment for defendant. Appeal by plaintiff. Heard in this court at the March term, 1898, and affirmed. Opinion filed May 11, 1898.

The opinion states the case.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was rendered upon the verdict of a jury in the Circuit Court, in a cause begun by appellee before a justice of the peace and appealed to the Circuit Court by the appellants, who again appealed to this court.

The only exception taken to any of the proceedings in the Circuit Court, was to the overruling of the motion for a new trial and entering judgment upon the verdict. There were no instructions to the jury requested or given, and there were no objections or exceptions taken to the evidence.

The argument is mainly a contention that the judgment is not sustained by the evidence, and that the damages allowed were excessive. The motion for a new trial did not in any manner call the attention of the court below to the claim that the damages were excessive. Excessiveness of damages can not for the first time be urged in this court. The attention of the court below must be first called to the excessive verdict in order that it may have an opportunity to correct the error. "To avail of such an error the party must by general or specific objection, make it a ground for granting a new trial, and when that is not done the defendant will be regarded as having waived the objection." *Oberman Brewing Co. v. Ohlerking*, 33 Ill. App. 26; *Richey v. Dunham*, 50 Ill. App. 246.

The objection that the evidence does not sustain the judgment is all that remains worthy of serious consideration. Where a verdict has been rendered contrary to the evidence, or where there has been no evidence at all to support it, a new trial should be granted. *Southworth v. Hoag*, 42 Ill. 446.

But a reversal of the decision of the jury is not warranted in case there is a conflict of evidence, where the court can see from the whole record that justice has been done. Interference will only be had in order to prevent a plain perversion of justice. *Illinois Central R. R. Co. v. Chambers*, 71 Ill. 519.

Applying these rules we conclude that the evidence affords sufficient justification for the verdict. It was but right that the appellants should pay for the goods wrongfully lost by them.

The judgment of the Circuit Court will therefore be affirmed.

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148a	204
51	78
70	97

Northwestern Traveling Men's Association v. Schauss.

1. **FORFEITURES—*Mutual Aid Associations***—Except in cases where the contract provides for a forfeiture of all rights under it, *ipso facto*, on the happening of some event, the good standing of a member in a mutual benefit association will continue until his status has been shown to be changed by some proceeding of the association, taken in pursuance of its rules and by-laws.

2. **CORPORATIONS—*Mutual Aid Associations—Rights of Member***.—Where anything remains to be done to determine the attitude of a corporate body toward one of its members, the doing of that thing can only be known through its action as such corporate body.

3. **FORFEITURES—*Ipso Facto Under By-laws***.—Unless the law of a mutual benefit association works a forfeiture, *ipso facto*, upon the failure of a member to pay an assessment in time, a notice by the secretary has no such effect, especially so where there is no provision in the law of the association vesting him with the power to determine the status of a member.

4. **MUTUAL BENEFIT ASSOCIATIONS—*Ipso Facto Forfeiting Clauses***.—A by-law of the Northwestern Traveling Men's Association provided that, "Upon receiving notice of the assessment, it is the duty of every member to remit the amount promptly to the treasurer of the association. A notice sent to the last address given, shall be considered a legal notification. Any member who does not remit the amount of his assessment within thirty days from the date of notice, shall forfeit his claim to membership and have his name stricken from the roll." *Held*, not to be self-executing, and the fact that a member did not pay the assessment in full in time, did not, *ipso facto*, terminate his membership in the association.

5. **MUTUAL BENEFIT ASSOCIATIONS—*Notice of Assessment***.—A reasonable construction of a by-law, providing that notice sent to the last address shall be considered a legal notification in its entirety, and one that the contracting parties may well have intended, is, that a notice sent by mail to the last given address of the member, allowing a reasonable and usual time for it to reach its addressed destination by due course of mail, would constitute a sufficient and legal notification, and be considered as received by the member at the expiration of such time, and that any member who failed to remit within thirty days thereafter might be treated as in default.

6. **MUTUAL BENEFIT ASSOCIATIONS—*Substitution for Actual Notice, etc.***—When a substitution for an actual notice is provided, nothing should be left to inference, in order to determine whether such provision has been complied with. A substantial compliance with the required method of notice, where one is provided to take the place of actual notice must always be shown in cases where a forfeiture is claimed by reason of such a substituted method.

Northwestern Traveling Men's Ass'n v. Schauss.

7. **FORFEITURES—Of Substantial Rights.**—Forfeitures of substantial rights, or of valuable property interests, are not favored in law or in equity and will not be supported except upon a clear showing of default.

8. **MUTUAL BENEFIT ASSOCIATIONS—Manner of Giving Notice of Assessment.**—The provisions of a by-law, that a notice sent to the last given address of the assured is to be a legal notification, merely prescribes a method of serving the notice in substitution of personal service, and not that notice shall, upon being "sent," date from the day of sending. Something more than a mere sending is implied. It should be sent by a recognized mode of conveyance in order that delivery in a regular course may be presumed.

9. **MUTUAL BENEFIT ASSOCIATIONS—Service of Notice of Assessments.**—A sufficient compliance with the by-law of a mutual benefit association, providing for notice to members, consists in the depositing of the notices, properly addressed, in the postoffice, but the association must show that the notice was addressed as provided by the contract between the parties, and allow a reasonable and usual time for it to reach the member.

10. **MUTUAL BENEFIT ASSOCIATIONS—Remittances in Time—Application of the Rule.**—S. was a member of the Northwestern Traveling Men's Association, in good standing up to August 20, 1887. It was contended that he forfeited his membership on that date by failing to pay \$2 of an assessment of \$6, theretofore levied by the association. He paid the two dollars, but it was not received by the association until four days after the time for payment had expired. The notice of the assessment bore no date, but was probably sent on the 20th day of July. S. had \$4 to his credit in the association. *It was held*, that the remittance was made in due time.

11. **MUTUAL BENEFIT ASSOCIATIONS—Can Not Keep a Member's Money and Insist That His Membership Is Lost.**—A member of a mutual benefit association made a remittance of his assessment; it was claimed that it was received a few days late by the association, and notice was sent him that his membership was lost. He then demanded a return of his money, which was refused. *It was held*, that the association had no right to retain his money after that and insist that his membership was forfeited.

Memorandum.—Action on a mutual benefit certificate. Appeal from the Circuit Court of Cook County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the March term, 1893, and affirmed. Opinion filed June 14, 1893.

The opinion states the case.

IRA W. BUELL, attorney for appellant.

WEIGLEY, BULKLEY & GRAY, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The question in this cause is whether John Schauss was a member of appellant company, in good standing at the time of his death. It is admitted by appellant association that he was a member in good standing up to August 20, 1887, but it is contended that he forfeited his membership on that date by failing to pay \$2 of an assessment of \$6 theretofore levied by the association. He did pay the \$2, but it was not received by the association until the 24th day of August, 1887, and it was not sent by Schauss until the 23d of August, 1887. The association, however, retained the money and still retains it, but its secretary notified Schauss, that the \$2 was received too late, and his membership was therefore forfeited. It is conceded by appellant that if Schauss did not forfeit his membership on August 20th, that then he did not forfeit his membership between that date and the day of his death, as there is no pretense that the association sent him any further notices.

It is insisted by appellee that there was no ground under the by-laws of the association to declare Schauss suspended on that date, and that, as a matter of fact and of law, under the by-laws of the association he was not suspended.

John Schauss became a member of the association December 16, 1876, and died April 21, 1888.

At the time the assessment notice was sent to Schauss he had \$4 to his credit on the books of the association, and if the \$2 remitted by him had been received in time, there would have been no ground to claim a forfeiture or suspension of membership against him.

The notice stated that the assessment would close on August 20, 1887.

Section 2, of article 4, of the constitution of the association provides: "Upon receiving notice of an assessment it is the duty of every member to remit the amount promptly to the treasurer of the association. A notice sent to the last address given shall be considered a legal notification. Any member who does not remit the amount of his assessment

within thirty days from the date of notice, shall forfeit his claim to membership and have his name stricken from the roll; but any such person may again become a member upon payment of all dues, subject, however, to the approval of the board of directors.

It will be seen that in case of non-payment of an assessment within thirty days from the date of notice, the member so defaulting "shall forfeit his claim to membership, and have his name stricken from the roll."

The provision is different from the law of the order shown in *Hansen v. Supreme Lodge, etc.*, 40 Ill. App. 216. There the language was, "failing which he shall stand suspended," and it was held to be self-executing.

In the *Hansen* case, by his default he thereby stood suspended. Nothing remained to be done to carry into effect the result of his default. Is that the effect of the language of section 2 above quoted? It must be held to be self-executing, or *Schauss* was never lawfully suspended; for it is not pretended that the board of directors of the association, in whom was vested the management of its affairs, took any action to declare his membership forfeited. All that was done was the act of the secretary of the association in notifying *Schauss* that his remittance had come too late and that he was in consequence suspended.

But, unless the law of the association worked a forfeiture, *ipso facto*, upon the failure of a member to pay in time, such a notice by the secretary had no effect. There is no provision in the law of the association vesting the secretary, or any other single officer, with power to determine the status of a member.

Article 3, Sec. 3, of the constitution of appellant, which provides that the secretary shall "report all delinquencies in payment to the board of directors," confers no power upon the secretary to declare the result or effect of non-payment, but seems to require affirmative action by the board in case of a delinquent, before any effect can be given because of his delinquency.

"Except in cases where the contract provides for a for-

VOL. 51.] Northwestern Traveling Men's Ass'n v. Schauss.

feiture of all rights under it, *ipso facto*, on the happening of some event, the good standing of the member in the society will continue until his status in the society has been shown to be changed by some proceeding of the society taken in pursuance of its rules and by-laws." High Court, etc., v. Zak, 35 Ill. App. 613.

Where anything remains to be done to determine the attitude of a corporate body toward one of its members, that can only be known through its action as such corporate body. Independent Order, etc., v. Zak, 136 Ill. 185.

Counsel for appellant, however, claims nothing through action by the board of directors or by the secretary, but insists that the mere fact of non-payment within thirty days from the date of notice, constituted in itself a forfeiture of the membership.

We are aware of a considerable lack of harmony in the authorities as to the true construction to be given to kindred clauses having for their object the forfeiting of memberships for non-compliance with the rules of similar societies, but we know of no case where, the court being in doubt owing to an ambiguity or uncertainty in the law of the society, which constitutes a part of the contract of the parties, that the rule has not been applied that all ambiguities shall be resolved against the society and in favor of the beneficiary.

If, therefore, there were no other question in this case, we should be inclined to hold, although not without much hesitation, because of the difference in authority referred to, that the clause in question is not self-executing, and the fact that Schauss did not pay the assessment in full on August 20th, did not, *ipso facto*, terminate his membership in the association.

We are aided in reaching this conclusion by the construction put upon section 2, by the appellant association itself. Its secretary, Mr. Hinman, testified that if Schauss "had purchased a money order from the post office on the 18th or 19th and mailed it on the 23d, it would have been credited to him;" and again, he testified: "We received other remit-

Northwestern Traveling Men's Ass'n v. Schauss.

tances for that assessment long after that from persons that were far away."

It should not be inferred from anything we have said that Schauss did not remit the \$2 in time. Upon that question section 2, *supra*, provides: "Upon receiving notice of an assessment, it is the duty of every member to remit the amount promptly to the treasurer of the association. A notice sent to the last address given shall be considered a legal notification. Any member who does not *remit* the amount of his assessment within thirty days from the date of notice shall forfeit his claim to membership," etc.

The remittance was made by Schauss from Milwaukee, Wisconsin, on August 23d, by postal order of that date, and was received by the association on August 24th.

The notices of assessment sent out bore no date, and there is no evidence, except such as arises from the probable fact that the notice to Schauss was deposited in the mail in Chicago on July 20th, and that he made a remittance on August 23d, as to when the particular notice addressed to Schauss was received by him.

We say "probable fact" of mailing on July 20th, because of the very loose proof made on that subject.

There was no attempt made to prove what the "last address given" of Schauss, was. It is pure conjecture as to whether it was Milwaukee, Wisconsin, or San Francisco, California. And it is very material to know what distance the notice had to travel by mail, if, as we shall show, the "date of notice" means, not the date the paper bore, or the date it was deposited in the post office, but the date when in due course of mail it would reach its addressed destination.

If, in this case, the notice was mailed late on July 20th, and had to travel three or four days before it could reach Schauss at his "last address given," the remittance made by him on August 23d was within thirty days from the date of notice to him, and was in time to preserve his membership from forfeiture.

The unaided fact that he remitted from Milwaukee, is by

no means conclusive that the notice was addressed to him at that place, and may be said to prove nothing more than that he had received the notice on or before August 23d.

The whole of section 2 must be read together in order to ascertain what the contract was as regards notice, and payment.

The first clause would by itself mean that the receipt of actual notice by the member, preceded his duty to remit, but considered in connection with what follows, and the circumstances of the case, we would not be warranted in holding that actual notice to the member is necessary. It would render the working of societies of this kind, with their hundreds, or thousands, of widely scattered members, impracticable, to so hold. A reasonable construction of the section in its entirety, and one that the contracting parties may well have intended, is, that a notice sent by mail to the last given address of the members, allowing a reasonable and usual time for it to reach its addressed destination by due course of mail, would constitute a sufficient and legal notification, and would be considered as received by the member at the expiration of such time; and that any member who should not remit within thirty days thereafter would be treated as in default. Such construction may be thought to be somewhat at variance, in the matter of fixing the time from which the notice in such cases should date, with what seems to have been held by this court in the Besterfield case, and by the Supreme Court in the Palmer case; but we think the difference is more apparent than real. There it was, in substance, said that the date of the notice means the day it is delivered or received, and not the date written in the notice, or the date it is mailed. *Illinois Order, etc., v. Besterfield*, 37 Ill. App. 522; *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

The Besterfield case is expressly based upon the Palmer case, and unless, in the latter case, it was intended to hold that actual notice must come to the member before the time would begin to run, such would not be the correct understanding of what was intended to be held by this court in the former case.

We infer that the Supreme Court meant only to hold that something that would amount to either presumptive or actual notice, must be shown, for, on page 95 of the opinion, in considering the effect to be given to an agreement in the policy that a notice directed to the address of the assured, as it appeared on the books of the company, and deposited in the post office, should be deemed legal notice, it was decided that the acts of directing the notice and depositing it in the post office, would not fix the time when the notice was given, but that "a reasonable time would still be required for the notice to reach the assured."

The reasonable implication from such language is that the notice need not be actually received by, or delivered to, the member, but that it would be considered as having been received by him after the lapse of "a reasonable time" for the notice to reach him by due course of mail, after being deposited in the post office.

We can not assume, in the absence of clear expressions to that effect, that the Supreme Court meant to hold that this class of associations, whose memberships number thousands, would be required to prove actual delivery to each member of assessment notices, when, by their laws, a general method of service is provided for, other than personal service.

The Supreme Court of Kentucky has laid down, in plain words, what seems to us to be the true rule, and one that is not inconsistent with any holding by this court, or the Supreme Court, in *National Mutual Benefit Association v. Miller*, 85 Ky. 83.

The provision there about giving notice was nearly identical with the one in the case at bar, and it was there said:

"The time within which payment is to be made is not to be computed from the actual date of the notice, or from the day it was mailed to the member, but, when sent by mail, from the time at which the notice would, in the regular course of the mail, be received by the member."

Accepting such to be the correct rule by which to determine when the notice in this case was received by Schauss, we are confronted by a lack of proven or admitted facts to which to apply it.

Beyond the fact that the notice probably was mailed on July 20th, we have nothing to show when it was received by Schauss, except that he made a remittance on August 23d. It is not shown to what address the notice was sent, nor is it made to appear what the last given address of Schauss was on the books, or other records of the association. Such proof was within easy reach of the appellant, and its absence should not count in appellant's favor.

Article 1, section 1 of the by-laws, provides:

"He (the member) shall furnish the secretary of the association with his full name and address, shall notify him of every permanent change in the same, and in view of any long-continued absence from the place of his address, shall designate some person to whom all notices of the secretary may be sent during his absence."

Schauss was a "traveling man." Presumably he had complied with the requirements of that by-law, for he had been a member of the association for nearly twelve years, and there is no pretense but that the association had his address.

What that address was, however, nothing in the record discloses. Conjecture as to what it was can not be made to take the place of proof in so important a matter.

When a substitution for actual notice is provided, nothing should be left to inference in order to determine whether it has been complied with. A substantial compliance with the required method of notice, where one is provided to take the place of actual notice, should always be shown in cases where a forfeiture is claimed by reason of such a substituted method.

Forfeitures of substantial rights, or of valuable property interests, are not favored, and will not be supported except upon a clear showing of default.

The provision that a notice sent to the last given address of the assured shall be a legal notification, merely prescribes a method of serving notice in substitution of personal service, and not that notice shall, upon being "sent," date from the day of sending. Something more than a

Northwestern Traveling Men's Ass'n v. Schauss.

mere sending is implied. It should be sent by a recognized mode of conveyance, in order that delivery in regular course may be presumed. No one would contend that the dispatching of several thousand notices by the hands of a messenger boy would operate to excuse proof of actual delivery. We have here held that a sufficient compliance with that provision consists in the depositing of the notices, properly addressed, in the post office; but it still remained for the appellant to show that the notice was addressed as provided by the contract between the parties, and to allow a reasonable and usual time for the notice, so addressed and deposited in the mail, to reach the member. He was entitled to thirty full days after the notice would be presumed to have reached him, within which to make remittance. But there is nothing in the record from which we can say that the notice was addressed as required by the law of the association, which was the contract between the parties, or that thirty full days elapsed between the time when it should, in regular course, have reached its destination, and the date on which Schauss made the remittance.

We are, therefore, unable to say the court below erred in finding that the remittance was sent in due time.

As we said in the Besterfield case, *supra*, "the verdict must be taken as determining that the assessment was paid within thirty days from the receipt of notice," and that Schauss was, therefore, in good standing at the time of his death.

One other point remains to be considered.

The association not only retained the \$4 which stood credited to Schauss on its books at the time the assessment in question was made, but also the \$2 remitted by him on August 23d, notwithstanding it claimed a forfeiture of his membership because of his failure to pay the assessment, for the payment of a part of which the association itself appropriated the \$4. Mr. Hinman, the secretary, testified: "He" (referring to Schauss) "had paid \$4 on the assessment on which he became a delinquent. He only owed on that matter."

Schauss, in his letter to Hinman, the secretary, dated September 28, 1887, after being informed that he had lost his membership, because his remittance of \$2 was received too late, demanded a return of his \$6, but no part of the \$6 belonging to him, and held by the association, was ever returned or offered to him.

Hinman testified: "The association still has the \$4 we had on hand, and the \$2 which he sent us and which came too late, and we have never returned it to him;" * * * "the association holds the \$2 subject to order." * * * "The reason the \$2 that came too late was not returned to Mr. John Schauss was because it was held subject to his order—subject to his medical examination;" and Mr. Robertson, appellant's cashier, testified: "The money stands on our ledger to the credit of John Schauss; it was put in the bank with the rest of the funds."

Although there were three death losses—Nos. 143, 144 and 145—which the assessment was made to cover, there was but one assessment of \$6 to cover the three losses, and but one notice.

On a part of the notice sent to Schauss, there was added, and signed by Hinman, the secretary and treasurer, the following:

"Proofs of the above deaths having been furnished, the board of directors have ordered that an assessment of \$6 be issued July 20th, closing August 20th, to cover them."

On the part of the notice which was returned to the association, as required, when Schauss remitted the \$2, there was stamped:

"There is \$2 due from you on this assessment."

Hinman wrote Schauss on August 24th:

"Your remittance of \$2 to cover assessment 143, 144 and 145 came to hand this A. M. Said assessment closed on Saturday last, the 20th."

The fact that Schauss wrote of the assessment, describing it as No. 145, when he remitted the \$2, did not give to the assessment a character it did not possess. The question is, what did the association by its acts make the assessment, and what was it in fact?

Northwestern Traveling Men's Ass'n v. Schauss.

We think the notice itself, of the assessment, including what accompanied it, as shown, together with what followed, makes it clear that there was not an assessment for each of the three death losses, but that there was only one assessment of \$6 to cover them all. When it was that this plan of appropriating the \$4 which the company had on hand to the credit of Schauss, to the payment of his share of death losses 143 and 144 was conceived or carried into effect is not apparent from anything we are able to find. That it had not been done at the time the notice was sent out is clear, from the fact that the notice specified the three death losses by numbers, and stated that an assessment had been made to cover them all, and that \$2 remained due from Schauss on them all, and not that the \$4 paid Nos. 143 and 144, and that \$2 was due on No. 145.

Hinman, it is true, testified:

“He (referring to Schauss) had already paid 143 and 144, and we stamped on this notice ‘There is \$2 due from you on this assessment.’” But such a statement, in view of what has been said with reference to the notice and what followed it, seems to be the statement of a conclusion drawn from something done by the association subsequent to August 20th, rather than the statement of a fact occurring before that date.

He says nothing of the kind, but quite the contrary, in his letter of August 24th, to Schauss.

In his testimony, Mr. Hinman does not profess to say when it was that Schauss “had already paid 143 and 144.”

We consider it to be a fair inference, gathered from all the evidence, that it was not until after the association, or Mr. Hinman, its secretary, had elected to treat Schauss as a delinquent, and when the accounts of the association with the respective death losses came to be entered upon its books after the assessment had been closed, that the money on hand to the credit of Schauss was appropriated or applied to the settlement of his share of death losses 143 and 144, exclusively, thereby leaving him in apparent default as to the whole of death loss No. 145, and to that loss alone.

This, we think, the association had no right to do. The assessment was an entire one, and Schauss was either in default as to it as a single assessment, or not at all. Probably the association could not be required to accept and apply the \$4 as a two-thirds payment of the whole assessment, and give to Schauss any advantage which such an acceptance and application might, possibly, confer upon him, because of there being no authority under the by-laws to declare a forfeiture for a failure to pay part of one assessment; but, on the other hand, neither could the association keep his money and at the same time make of him a delinquent.

Schauss appears to have made his demand for a return to him of the whole \$6 in apt season. There appear to have been negotiations pending between him and the association for a revival of his membership all along during the month from August 24th to September 28th, at which time he wrote for a return of the \$6 and he would then be out of the association.

The association had no right to retain his money after that and insist that his membership was forfeited.

The whole record considered, the judgment of the Circuit Court will be affirmed.

Barnes v. Ludington et al.

1. **OPTION CONTRACTS—Right to Fix the Penalty of a Bond.**—Where parties entered into an option contract for a lease of premises for ninety-nine years at a yearly rental of \$15,000, and upon which a building was to be erected by the lessee of the value of \$300,000, within a time specified in the contract, for the construction of which a good and satisfactory bond was to be given, but no amount was fixed for the penalty of the bond, *it was held*, that the contract contemplated that the parties giving the option should have the right to decide within reasonable limits what the amount of the bond should be.

2. **SPECIFIC PERFORMANCE—Requisites of the Contract.**—To enable a court to enforce the specific performance, the contract must be certain in all its material provisions. The court can not make a contract for the

Barnes v. Ludington.

parties; that must be done by the parties themselves; and if they have failed to do so in any material respects, the court can not supply for them what they have left unprovided for.

3. SPECIFIC PERFORMANCE—*Contracts Not Susceptible of—Illustration.*—An agreement, as for instance, the building a house of a certain value, is not one which a court will direct to be specifically performed.

Memorandum.—Bill for specific performance. In the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Bill dismissed for want of equity; complainant brings error. Heard in this court at the March term, 1893, and affirmed. Opinion filed July 12, 1893.

The opinion of the court states the case.

BRIEF OF PLAINTIFF IN ERROR, MORAN, KRAUS & MAYER,
ATTORNEYS.

The plaintiff contended that the option of August 25, 1891, resting as it did, upon a consideration paid, though not of itself imposing any obligation upon plaintiff in error until she should signify her intention to claim the right she had purchased, was yet binding upon defendants in error. It was an offer, for the refusal of which within the time limited, plaintiff in error had paid the agreed price. If within that time she accepted the offer, there then arose between the parties a completed contract imposing mutual obligations, which a court of equity will specifically enforce. *Waterman on Spec. Perf.*, Sec. 200; *Fry on Spec. Perf.*, 3d Ed., Sec. 445; *Beach on Mod. Eq. Juris.*, Sec. 587; *Johnston v. Tripp*, 33 Fed. Rep. 530; *Hawralty v. Warren*, 18 N. J. Eq. 124; *Miller v. Cameron*, 45 N. J. Eq. 95.

When plaintiff in error, on December 31, 1891, notified defendants in error of her election to accept the terms of the option, and of her readiness and willingness to discharge the obligations which it imposed upon her, and tendered the \$5,000, it devolved upon defendants in error to prepare, execute and tender the lease, and indicate to plaintiff in error the kind of bond that would be satisfactory to them. *Buckmaster v. Grundy*, 1 Scam. 310; *Headley v. Shaw*, 39 Ill. 354; *Cooper et al. v. Hamilton*, 52 Ill. 119; *Baston v. Clifford*, 68 Ill. 67; *Tinny v. Ashley*, 15 Pick. 546;

Doyle v. Harris, 11 R. I. 539; Longworth v. Taylor, 1 McLean (U. S. C. C.) 395.

BRIEF OF DEFENDANTS IN ERROR, PENCE & CARPENTER,
ATTORNEYS.

The rule established in this State is that specific performance of a contract as to real estate will not be enforced unless it appears that the complainant is not, and that the defendant is in default at the time of filing the bill, and that the complainant is ready, able and willing to perform the contract on his part. Doyle v. Teas, 4 Scam. 202, 265; Brown v. Cannon, 5 Gil. 174; Board of Supervisors v. Henneberry, 41 Ill. 179; Phelps v. Ill. Cent. R. R., 63 Ill. 468; Cronk v. Trumble, 66 Ill. 428; Kimball v. Tooke, 70 Ill. 553; Brink v. Steadman, 70 Ill. 241; Hoyt v. Tuxbury, 70 Ill. 331; Brix v. Ott, 101 Ill. 70; Woods v. Evans, 113 Ill. 186.

A contract which provides that a good and satisfactory bond shall be given for construction of a building, means that a bond satisfactory to the owners of the property should be furnished. The power is reposed in the owner to determine what is a good and satisfactory bond. Here a bond was offered with one surety, and he a non-resident, and no evidence has been offered by plaintiff in error upon whom the burden rested, that the bond was good as to surety and amount, and none to show bad faith on the part of defendants in error in refusing to accept the bond tendered. The evidence shows that the plaintiff in error understood that the agreement required her to furnish bond with sureties, and that she and her solicitors acted accordingly. Singerly v. Thayer, 108 Pa. 296; Seeley v. Welles, 120 Pa. 74; Zaleski v. Clark, 44 Conn. 224; Gibson v. Cranage, 39 Mich. 49; Harris v. Miller, 6 Sawyer, 319.

A court can not make a contract for the parties. All the terms and provisions of this lease were not agreed upon. The penalty of the bond was not agreed upon.

The plans and specifications of the lease were not agreed upon. This rendered the contract uncertain and incapable of specific performance. Brace v. Wehnert, 25 Beav. 348; Taylor

Barnes v. Ludington.

v. Portington, 7 De G., M. & G. 328; Stewart v. Lond. & N. R. R., 15 Beav. 513; South Wales Ry. Co. v. Wythes, 5 De G., M. & G. 880; Hodges v. Horsfall, 1 Russ. & Myl. 117; Huff v. Shepard, 58 Mo. 242-247; McKibbin v. Brown, 1 McCarter (Ch.), 13; Nichols v. Williams, 22 N. J. Eq. 63; Tiernan v. Gibney, 24 Wis. 190; Riley v. Farnsworth, 116 Mass. 223; Colson v. Thompson, 2 Wheat. 336; Blanchard v. D. L. & L. M. Ry. Co., 31 Mich. 43; Fitzpatrick v. Beatty, 1 Gil. 454; Bowman v. Cunningham, 78 Ill. 51; Brix v. Ott, 101 Ill. 70; Gosse v. Jones, 73 Ill. 508; Woods v. Evans, 113 Ill. 186; Wollensak v. Briggs, 20 Brad. 56; same v. same, 119 Ill. 465; Story, Eq. Juris., Secs. 741.

There is a want of mutuality of remedy in this contract; also there are particular parts thereof which can not be specifically enforced in a court of equity. In either case a court of equity will refuse to specifically enforce any part thereof. 3 Pomeroy Eq. Jur., Sec. 1405; Gervais v. Edwards, 3 Dru. & War. (Sugden's Decisions) 80; Stocker v. Wedderburn, 3 Kay & J. 393; Pickering v. Bishop of Ely, 2 Younge & Coll. Ch. 249; Johnson v. Shrewsbury & Birmingham Ry. Co., 3 De G., M. & G. 914; Hills v. Crolls, 2 Phill. Ch. 59; Ogden v. Fossick, 4 De G. F. & J. 421; Lawrenson v. Butler, 1 Sch. & Lef. 13; Benedict v. Lynch, 1 John. Ch. 369; Marble Co. v. Ripley, 10 Wall. 339-358.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a bill in equity to enforce the specific performance of a contract for a lease for a term of ninety-nine years, of certain real estate in the city of Chicago.

The premises were very valuable, the rental provided for being \$15,000 a year for the first twenty years, and \$16,000 a year for the residue of the term, and the payment of all taxes and assessments, ordinary and extraordinary. The contract contemplated the erection of a permanent building upon the premises within a period of seven months from the first of the November following, at a cost of not less than \$300,000, as an additional security for the rent; and, to

secure the erection of such a building, it was provided that "a good and satisfactory bond" should be given to the owners of the lot.

The option for the contract of lease was dated August 25, 1891, and was as follows:

"To whom it may concern: This is to certify that Mrs. Agnes Benton Barnes has paid the sum of one thousand dollars, consideration for the option to take a lease on the lot, 80x160, situated on the south side of Jackson street, between Michigan and Wabash avenues, in the city of Chicago, Illinois, and known as the First Regiment Armory lot; said lease to be for a period of ninety-nine years from the 1st day of November, 1891; said lease to provide for the payment of all taxes, special assessments, or any and all other charges of whatever kind, ordinary or extraordinary, which may be imposed on the said property by city, county or State during the life of the lease, and for the erection within a period of seven months from the 1st day of November, 1891, of a stone, brick and iron building of absolutely fire-proof construction, at a cost of not less than \$300,000, in accordance with plans and specifications drawn by Flanders & Zimmerman, or other competent architects, and for which construction within the time specified a good and satisfactory bond shall be given by the said Agnes Benton Barnes, or her assigns, to the owners of said lot. Said lease shall also provide for a yearly rental to be paid during the said term of ninety-nine years, said rental to be at the rate of \$15,000 annually for the first twenty years of said term, and of \$16,000 annually thereafter during the balance of said term of ninety-nine years, said annual rental to be paid in equal monthly installments on the first day of each month in gold coin of the United States of the present standard of fineness, or the equivalent thereof. The lessee shall procure, pay for and deliver unto the lessors policies of insurance in good and satisfactory companies against loss or damage by fire to the said building, and any loss or damage by fire shall be paid to the lessors and held by them as security for rebuilding or repairing the building.

It is agreed and understood that the lease herein referred

Barnes v. Ludington.

to shall be amplified and extended to the satisfaction of the lessors, and shall contain such other covenants, clauses, conditions and agreements, usual and customary in the making of leases of like situate property, for the term of ninety-nine years, to the satisfaction of the lessors, and furthermore, that upon the delivery of said lease, the lessee shall pay over to the lessors the sum of five thousand dollars, as earnest money, which said sum shall be credited on the account of rent due the first year under the said lease.

This option shall hold good until and including the 1st day of November, 1891, and in the event of the said Agnes Benton Barnes not having availed herself of this privilege for a lease at the said last mentioned date, then this option shall be null and void, and shall be delivered up to be canceled, and the aforesaid sum of one thousand dollars shall be forfeited to the owners of the said property.

This option and privilege is given upon the express agreement and understanding that under no circumstances shall it be filed for record anywhere, and that a recording of the same shall constitute and work an immediate forfeiture and cancellation hereof.

Witness our hands and seals this 25th day of August, 1891.

CHARLOTTE J. LUDINGTON, [SEAL.]

MARY L. BARNES, [SEAL.]

By CHAS. J. BARNES, [SEAL.]

Attorney in Fact."

"I hereby accept the terms of the above option, and agree not to file the same for record; and I further agree to surrender and deliver up the same for cancellation on the 2d day of November, A. D. 1891, unless a lease on it prior to that date is accepted and executed in accordance with the terms in this option contained.

AGNES BENTON BARNES.

August 25, 1891."

It is agreed that only \$500 was paid, instead of \$1,000 as recited.

Two extensions of the option were granted by the owners, the first one for three weeks from November 1, 1891, and the second until December 31, 1891.

Very soon after the option was first given, the attention of the parties was drawn to the fact that the amount of the bond to be given was not mentioned in the contract, and Mr. Charles J. Barnes, who acted for the defendants in error, in conjunction with Colonel Jackson, their attorney, informed the plaintiff in error and her agents, that a bond of \$150,000 would be required. Repeated attempts were subsequently made in the interest of plaintiff in error to induce defendants in error to fix a less amount of bond, but without success. We think the option contemplated that the defendants in error should have the right to decide within reasonable limits, what the amount of the bond should be.

Under the doctrine laid down in *Henderson v. Connelly*, 123 Ill. 98, and in *Paulsen v. Manske*, 126 Ill. 72, it is uncertain to what extent the fee of land might be subject to mechanics' liens, where a lease is made providing for the erection of a building upon the premises.

The object in requiring the erection of such a building as the option contemplated, was security for the payment of the stipulated rent.

It would not be unreasonable that a bond to secure the erection of a building in such a case, should be such as would secure, not only the construction of the building, but that no liens should remain on the building, or the land, whereby the value of the security should be impaired.

Generally, a bond to secure the performance of something costing money, is with a penalty beyond the cost of the act to be performed.

In view of the fact that a building to cost not less than \$300,000 was to be constructed upon the premises, and of the possibility of liens in favor of mechanics and materialmen, and the possible necessity, by the owners of the land, to complete a structure upon it which they might not wish, or be prepared to engage in, a bond of \$150,000 was not unreasonable for them to require.

The bond that was tendered was for \$100,000, and was rejected on the ground that it was not a good and satisfactory one.

That it was not satisfactory in amount, the plaintiff in error already knew; and when, as soon as it was presented, it was objected to on the additional ground that it was not good, the duty of showing it was good rested upon the plaintiff in error, if she wished to avail herself of the advantage of its tender. The evidence shows that the plaintiff in error was not possessed of any considerable pecuniary means of her own; and the extent of information furnished to the defendants in error as to the financial responsibility of Mr. Leavitt, who signed the bond as surety, or of his sufficiency as surety on such a bond, consisted of a statement made by the attorney of the plaintiff in error to the attorney of defendants in error at the time the bond was tendered, that Mr. Leavitt lived in New York, and that he had been informed that Leavitt owned property in New York and Denver.

Manifestly such a showing amounted to very little.

But it is contended that no surety was required; that by the terms of the option contract, the giving of an individual bond by the plaintiff in error was all that was demanded. The circumstances surrounding the making of the contract, and the purpose to be effected by the giving of a bond, forbid any such construction. It would have been an idle thing to give a bond with no surety to secure the performance by the same party of a covenant in the lease, to build. The covenant to build would have been just as good security to the owners of the property as the individual bond of the covenantor. Under such circumstances when a bond is required to be given, it is meant that a bond with surety shall be given, and when a "good" bond is agreed to be given, it is meant that the surety shall be good.

The object in requiring a bond was security, and that means something more than an agreement by the same person to pay or perform what he or she had already agreed to pay or perform. The heaping up of one agreement on top of another to do the same thing adds no force or security to the original undertaking.

The circumstances and purposes of the parties will be

looked at to determine what was contemplated by them. *Harris v. Miller*, 6 Sawyer (U. S. C. C.) 319.

So that, if the tender of a bond was necessary before the lease was executed and ready for delivery, we entertain no doubt that the bond tendered was not such an one as the defendants in error were bound to accept.

We will not decide, or discuss the question, whether the delivery or tender of the bond contemplated by the parties, was a precedent act to be performed by plaintiff in error, or was one to be done concurrently with and dependent upon the offer of a lease, for the reason that, in our opinion, the decree dismissing the bill must be affirmed upon other and plainer grounds.

The plaintiff in error is asking for the specific performance of a contract. To enable a court to enforce the specific performance of a contract, the contract must be certain in all its material provisions. The court can not make a contract for the parties; that must be done by the parties themselves; and if they have failed to do so in material respects the court can not supply for them what they have left unprovided for.

Here was a contract that the lease provided for should be "amplified and extended to the satisfaction of the lessors, and shall contain such other covenants, clauses, conditions and agreements, usual and customary in the making of leases of like situate property, for the term of ninety-nine years, to the satisfaction of the lessors."

The bill says nothing as to what are usual and customary covenants in leases for ninety-nine years, or that in fact there are any such usual and customary covenants. Shall the court say that there are such customary covenants as that parties by bare reference may be supposed to have contracted with reference to them? If so, what are they? The bill gives no information upon the subject, and this court does not know what they are.

Shall there be a right of re-entry reserved? If so, after how long a default? If the taxes and assessments are not paid by the lessee, may the lessors pay them and add the amount to the next, or any other, installment of rent? If

Barnes v. Ludington.

so, shall the tax and assessment warrants be conclusive as to the legality of the taxes and assessments, or must the lessors prove the proceedings as in the case of ejectment on a tax title? At the end of the term what shall be done with the building? Shall the lessors pay the value of it, or a percentage, and what percentage of its value, and, if either, how shall such value be ascertained? It has already been seen that the plaintiff in error did not accede to the giving of a bond in the sum required by defendants in error. How can the court make her give a bond, such as was required of her?

Many other questions might be put, but these are enough to show that the point is well made, that the court can not make a contract for the parties, but can only enforce one they themselves have made.

Again, the contract provides for the construction of a building to cost not less than \$300,000, according to plans and specifications to be drawn by architects.

On the one hand, the lessors are entitled to have a building erected at a cost of not less than \$300,000, and on the other, the lessee is not bound to erect one at any greater cost. Common experience teaches that it would be impossible for a court to settle upon plans, to be prepared, the cost of execution of which should exactly equal the sum named, and it would be beyond its power to force the lessors to accept a less costly structure, or to require the lessee to build one at greater expense.

"An agreement for building a house of a certain value, is not one which this court will direct to be specifically performed." *Brace v. Wehnert*, 25 Beavan, 348. That was a case where the contract provided for the erection of buildings "of the value of £1,400 at the least.

Numerous other questions and difficulties present themselves in connection with the contract in question, but we think we have shown that so much that is material still rests in treaty between the parties, as to render the contract incapable of being specifically enforced in equity.

The decree of the Circuit Court, dismissing the bill, will therefore be affirmed.

The Columbian Hard Wood Lumber Company v. Langley et al.

1. **PARTIES—Promissory Notes—Maker and Guarantor.**—Parties can not be jointly sued on separate contracts. The guaranty and the note are separate contracts. The liability of the guarantor depends wholly on the terms of the contract of guaranty.

2. **PARTIES—Promissory Notes—Maker and Guarantor—Application of the Law.**—The company brought an action upon a promissory note, joining with the maker, two guarantors. *It was held*, that the contract of the maker of the note was entirely distinct from that of the guarantors, and although the guarantors were jointly liable on their contract of guaranty, and could have been sued in the first instance without having first sued the maker, it was error to join them in the same suit with the maker.

3. **MISJOINDER OF PARTIES—Pleadings.**—When the maker of a promissory note is joined with the guarantor as defendant it is not necessary that they should put in issue the question of their joint liability by a plea in abatement, or a verified plea in bar, as provided by section 36 of the practice act. The statute merely relieves the plaintiff from the common law burden of proving the defendant's joint liability, in the first instance, and leaves the defendants at liberty to disprove it without first denying it by plea; and where it affirmatively appears from the plaintiff's evidence, as from the note introduced in evidence in this case, that the defendants, who are sued jointly, are not jointly liable on the contract sued on, no recovery can be had.

4. **MISJOINDER OF PARTIES—Justices' Courts.**—Parties can not be sued jointly before a justice's court who can not be so sued in a court of record on the same cause of action.

5. **MISJOINDER—Recovery.**—In a joint action a recovery must be had against all or none of the defendants.

Memorandum.—Appeal from justice's court. In the Superior Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Trial by jury; verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the March term, 1893, and affirmed. Opinion filed April 6, 1893.

The opinion states the case.

EDWARD J. QUEENY, attorney for appellant.

No appearance for appellees.

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MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The suit below was brought upon a promissory note, offered and read in evidence, as follows:

“\$94.57.

CHICAGO, January 13, 1892.

Fifteen days after date I promise to pay to the order of the Columbia Hard Wood Lumber Co. ninety-four and 57-100 dollars, at room 35, 94 Washington street, value received.

GEORGE W. REID.”

(And on the back):

“W. B. LANGLEY,
N. WHITMAN.”

The action was brought against the maker, Reid, and the guarantors, Langley and Whitman, jointly. Parties can not be jointly sued on separate contracts. “The guaranty and the note are separate contracts.” *Abbott v. Brown*, 30 Ill. App. 376.

The liability of the guarantor depends wholly on the terms of the contract of guaranty. *Croskey v. Skinner*, 44 Ill. 321; *Abbott v. Brown*, *supra*.

The contract or undertaking of Reid, the maker of the note, was entirely distinct from that of the guarantors, and although the guarantors were jointly liable on their contract of guaranty, and could have been sued in the first instance without having first sued the maker, it was error to join them in the same suit with the maker. Their liability as guarantors depended upon a different contract than the one entered into by the maker, and was subject to be defeated upon entirely different and distinct grounds than those available to the maker. The engagement of a guarantor is strictly an individual contract and not an engagement jointly with his principal, and while several guarantors may be sued jointly, a guarantor and his principal can not be so joined as defendants. *Clark v. Morgan*, 13 Brad. 597.

Neither was it necessary that the defendants should have put in issue the question of their joint liability by a plea in .

abatement, or a verified plea in bar, as provided by section 36 of the practice act.

It has been repeatedly held that the statute merely relieves the plaintiff from the common law burden of proving the defendants' joint liability "in the first instance," and leaves the defendants at liberty to disprove it without first denying it by plea; and that if it affirmatively appears from the plaintiffs' evidence, as from the note introduced in evidence in this case, that the defendants, who are sued jointly, are not jointly liable on the contract sued on, no recovery can be had. *Davison v. Hill*, 1 Brad. 70; *Garland v. Peeney*, 1 Brad. 108; *Rosenberg v. Barrett*, 2 Brad. 386; *Bensley v. Brockway*, 27 Ill. App. 410; *Fisher v. Spang*, 43 Ill. App. 378.

Nor does it make any difference that the suit was begun before a justice of the peace. Parties can not be sued jointly who can not be so sued in a court of record on the same cause of action. The "action having been commenced before a justice, was in form, whatever the evidence would fit." *Fisher v. Spang*, *supra*.

The action being a joint one, a recovery must have been had against all or none of the defendants. *Rosenberg v. Barrett*, *supra*; *Kingsland v. Koeppe*, 137 Ill. 344.

Therefore, because the appellant could not maintain his suit against the appellees jointly, it is immaterial what errors were committed against him on the trial below. The judgment was right, irrespective of the alleged errors in the lower court.

The Appellate Court will not reverse a judgment because of erroneous processes in reaching it, where, if it had been the other way, a reversal upon appeal would have ensued. *Davis v. Johnson*, 41 Ill. App. 22.

Berkson v. The People of the State of Illinois.

1. APPELLATE COURT PROCEEDING—*What Will Be Considered upon an Appeal from an Order, etc.*—In a proceeding by creditor's bill, an order requiring the defendant to appear before the master and submit to

51	102
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154	81
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68	544
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79	119
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83	389
51	102
86	236

Berkson v. The People.

an examination touching his business and property, is an appealable order, under our statute, and its regularity can not be inquired into upon an appeal from a subsequent order committing the defendant to jail for contempt in disobeying it.

2. CONTEMPT OF COURT—*Proceedings to Punish*.—The method of procedure, where parties are alleged to be in contempt of court, in cases at law, has no application to proceedings in equity.

3. CONTEMPT OF COURT—*Order of Committal—Presence of Defendant*.—Where an order of commitment for contempt of court in refusing to submit to an examination before the master in chancery, recites "and also comes J. B., having due notice of said motion and application by his counsel," *it was held*, that when tested by recognized rules of grammar and punctuation, the language meant that the plaintiff in error was present, having been duly notified by his counsel.

4. NOTICE—*Once in Court—Presumptions*.—After a party has once been brought into court, the presumption is that he is present at and cognizant of every step taken in the cause, until it is terminated, unless considerable time has elapsed without any steps having been taken in the case.

5. NOTICE—*Once in Court, Always in Court—Application of the Rule*.—The defendant in a creditor's bill was ordered to submit himself to an examination before a master in chancery upon the motion of the complainant; he did so, but refused to answer questions, etc., for which he was, by a subsequent order, committed to jail for contempt. *It was held*, that, having submitted himself to the jurisdiction of the court, and submitted to the former order of the court, he must be held to have notice of every step in course up to the entry of the order of commitment.

6. CONTEMPT OF COURT—*Certainty in Order of Commitment*.—That there should be certainty in an order of commitment in a chancery cause, wherein the commitment is, until the contemnor shall do some required act, may be conceded, but it does not necessarily follow that because there are several required acts to be performed, some of which are too general in terms to be susceptible of complete performance, that those acts which are specific, and, in the nature of things, capable of performance, should not be done.

7. ORDER OF COURT—*Certainty as to Requirements—Contempt*.—The fact that an order as to a defendant in a creditor's bill, may have been too general in its requirements relating to the delivery by him to the receiver, "of his books of account, bills, notes, contracts, vouchers, documents, and any other evidences in writing, or documentary matter relating thereto, and to his business," is no justification of a disobedience in the particular that was certain and definite.

Memorandum.—Chancery proceedings. In the Circuit Court of Cook County. Proceedings for contempt of court; judgment of conviction; writ of error by the defendant. Heard in this court at the March term, 1893, and affirmed. Opinion filed March 18, 1893.

STATEMENT OF THE CASE.

Plaintiff in error having failed in business in the fall of 1891, a creditor's bill was filed in the Circuit Court of Cook County by Aaron Feltenstein upon a judgment recovered by him. On September 22, 1891, the Circuit Court entered an order in that case appointing Charles G. Perkins receiver, upon his filing a receiver's bond in the sum of \$1,000 to be approved by the court, and that plaintiff in error "do forthwith appear before I. K. Boyesen, master in chancery, and deliver to said receiver all his property not exempt from execution, as well as his bills, notes, contracts, books of account, vouchers and documents relating to said property or to his business." On December 12, 1891, the cause came before the court upon the report of said master, who reported that plaintiff in error had not truly discovered his assets, or produced his books, but claimed that they were lost, and that he had not accounted for at least \$7,500. Thereupon the court entered an order finding substantially what the master had found, and confirming his report, and also entered an order reciting substantially the facts alleged in the master's report, finding him guilty of a contempt of court in not having truthfully discovered his assets, books of account, etc., to said receiver, and ordering that for said contempt he stand committed to the common jail of said county to answer for said contempt, etc.

BRIEF OF PLAINTIFF IN ERROR, BLUM & BLUM, ATTORNEYS.

Contempts are divided into two classes: Those committed in the presence of the court, and constructive contempts, *i. e.*, those committed out of its presence. Where the alleged contempt is not committed in the presence of the court the matter must be brought before the court by affidavits of persons who witnessed it, and thereupon a rule must be made on the offender to appear and answer, or a rule to show cause why an attachment should not be issued. 4 Blk. 287; 1 Tidd Pr., 3d'Am. Ed. 88; In re Judson, 3 Blatch. C. C. Rep. 148; State v. Matthews, 37 N. H. 450; Clay's Case, Pr. Dec. 221; Crow v. State, 24 Tex. 12.

The party must appear in person and not by attorney.

Berkson v. The People.

Vin Abr., Contempt, F. 7; *People v. Wilson*, 64 Ill. 195; *Vertner v. Martin*, 10 L. and M. 103; 20 Am. Law Reg., N. S. 149, and cases cited; *Rawson v. Rawson*, 35 Ill. App. 505.

While a court may commit for contempt in its presence without the service of any process, it is essential to the validity of the order of commitment that it show that the defendant was present in court when the judgment was entered, and that no judgment against him would be valid which would be entered in his absence, and without the service of any process or rule of the court upon him requiring his appearance. *Louisiana v. Judges*, 32 La. Ann. 1256; *Trimball v. Barnard*, 15 Weekly Notes of Cases, 127; *In re Pollard*, 2 Law Rep. Privy Council Appeals, 106.

BRIEF OF DEFENDANT IN ERROR, MOSES, PAM & KENNEDY,
ATTORNEYS.

When an order in supplementary proceedings is issued by a judge having jurisdiction, the person upon whom it is served has only two paths to pursue, if he desires to avoid proceedings for contempt. He must obey it, or procure it to be set aside. Even if erroneous, he has no right to disregard it. *Rapalje on Contempt*, Sec. 39; *Wilcox v. Harris*, 59 How. Pr. 262; *In re Remington*, 7 Wis. 643; *Lutt v. Grimont*, 17 Brad. 308.

The practice contended for by counsel is, that the party is to be brought into court, whereupon he is to answer on oath to interrogatories filed in the nature of a charge touching the alleged contempt, and if the party can answer upon oath, he is discharged. This is not the practice in chancery proceedings. It probably is the practice in reference to common law contempts, but it does not obtain in a proceeding in equity in this State. *Petrie v. People*, 40 Ill. 334; *O'Callahan v. O'Callahan*, 69 Ill. 552; *Rawson v. Rawson*, 35 Ill. App. 505; *Welsh v. People*, 30 Ill. App. 399.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In September, 1891, a creditor's bill was filed by Aaron Feltenstein, complainant, against the plaintiff in error, and

on the twenty-second day of that month an order was entered in said cause, appointing a receiver, and directing the plaintiff in error to assign and turn over to such receiver all his estate, etc., not exempt from execution, and requiring him to appear before the master and submit to an examination touching his business and property.

Upon the coming in of the master's report, the exceptions thereto by the plaintiff in error were overruled, and the report confirmed, by order entered December 12, 1891, wherein it was found by the court that the plaintiff in error had failed to truly discover his assets and property in possession and under his control, and had contumaciously refused to truly testify and discover the whereabouts of the same; that he had refused to honestly account for moneys received by him, and that he had, when said original order of September 22d was entered, and still had, in his possession and under his control, at least the sum of \$7,500 in money, which it was his duty to pay over to the receiver, and that he refused so to do, all of which was in violation and disobedience of said original order.

And on the same day this order appealed from for a commitment to jail, in the name of the people, was entered, reciting, substantially, the same findings.

The order of commitment was for disobeying the original order of September 22d. Of that order the plaintiff in error most clearly had notice. In response to its requirements, he appeared before the master and testified, and by the order confirming the master's report and overruling his exceptions, it appears that "also came Jacob Berkson, having due notice thereof, and being represented in court by his solicitors."

His duty was fixed by that original order. That was an appealable order, under our statute, but the plaintiff in error never has sought by appeal to have it reversed or modified. On the contrary, he acquiesced in the order in so far as to submit himself to examination before the master. He can not now, in this proceeding, question the propriety of the order or its findings of fact. That could be done only by appeal from that order.

Berkson v. The People.

The assigned error that the order did not extend so far as to authorize the master to report to the court the testimony of plaintiff in error, and the master's conclusions thereon, can not be urged here for the first time. The order did by its terms require plaintiff to appear before the master and submit himself to an examination touching the matters in controversy. The objections filed before the master, and afterward filed as exceptions in the Circuit Court, fail entirely to raise that question. Those exceptions were wholly confined to controverting the correctness of the master's findings of fact.

No objection was made that either the master or the court was proceeding improperly, and we will not now, for the first time, hear such objections.

It is next urged that the order of commitment is void on its face, because it does not recite that the plaintiff in error was present when the order was entered, or had received personal notice that a rule had been entered, or would be applied for, requiring him to show cause why he should not be committed for a contempt of court.

As already stated, the plaintiff in error had notice of the order for the violation of which he was committed, and acted under it to some extent.

It appears on the face of the master's report, that he must have known what its recommendations would be, and the reasons for them.

The contempt of which he was found to be guilty, was determined from his own testimony before the master. He knew what the order required him to do, and he knew better than any one else that he was disobeying those requirements. His testimony showed that he had shortly before received large sums of money, and that he gave no reasonable account of their disposition. He therefore knew that he was violating the order of the court in refusing to discover the whereabouts of such moneys, and to turn them over to the receiver.

The cited authorities as to the method of procedure where parties are alleged to be in contempt of court in cases at law, have no application to proceedings in equity.

Neither was the contempt adjudged against plaintiff in error a criminal contempt committed in the presence of the court, but was a civil, as distinguished from a criminal, contempt, in that the act consisted of a refusal to do something that was commanded to be done, instead of being an overt act of commission. In such a case it may be questioned whether, when the judgment of commitment is entered, the personal presence in court of the contemnor is necessary. But whether that be so or not, we think the order of commitment sufficiently shows that the plaintiff in error was in court in person at the time it was entered.

The order recites: "And also came Jacob Berkson, having due notice of said motion and application by his counsel."

Tested by recognized rules of grammar and punctuation, that means that Jacob Berkson, the plaintiff in error, was present, having been duly notified by his counsel of the motion and application. What the fact may have been, we have no means, other than from the record, of knowing.

Counsel for the plaintiff in error, speaking outside of the record, say he was not present, but counsel for defendant in error answer with equal positiveness, that as a matter of fact he was present, and that counsel for plaintiff in error could not, of their own knowledge, speak concerning his actual presence or absence, for the reason they were not then in any way connected with the case.

It was said in *Petrie v. The People*, 40 Ill. 334, and restated in *O'Callaghan v. O'Callaghan*, 69 Ill. 552, "After a party has once been brought into court, the presumption is that he is present, and cognizant of every step taken in the cause until it is terminated, unless there has been considerable time elapsed without taking any steps in the case;" and it was held that notice was not necessary, that an attachment would be asked.

In this case, the plaintiff in error well knew that he had been ordered to disclose his property and turn it over to the receiver, and that he had not complied with the order, and he was bound to know the penalties of the law incurred by him for such disobedience.

Berkson v. The People.

So that if the recital in the order that he was present in pursuance of notice, admits of a construction, such as might be given to it, that he was present only by counsel, it would still seem to be enough. The court had undoubted jurisdiction to make the original order. Plaintiff in error submitted himself to the jurisdiction of the court, and had actual notice of every step in the cause up to the entering of the order of commitment, and if not then personally present, he was present by counsel, who asked for no opportunity for him to be heard to purge himself. We do not think, upon the showing made by the record, that the plaintiff in error can complain that he was insufficiently heard in defense of his contempt.

It is further insisted that the order of commitment is void because it finds the plaintiff in error guilty of several distinct offenses, and commits him to jail until he shall have complied with each one of the several requirements imposed upon him.

That there should be certainty in an order of commitment in a chancery cause, wherein the commitment is until the contemnor shall do some required act, may be conceded, but it does not necessarily follow that because there are several required acts to be performed, some of which are too general in terms to be susceptible of complete performance, that those acts which are specific, and, in the nature of things, capable of performance, should not be done. In the order complained of, the finding that the plaintiff in error had in his possession at least the sum of \$7,500, which it was his duty to have turned over to the receiver in pursuance of the original order, was definite and certain. Had the plaintiff in error turned that sum over to the receiver, as was found to have been his duty, and applied to the court for a modification of the order in those other respects in which it is claimed it was too general, there can be no doubt but the court would have so modified the order as to have made it comply with the requirements of justice.

The case of *Tolman v. Jones*, 114 Ill. 147, was an appeal from an order of commitment for refusal to obey a previous

order in the same cause, directing an assignment to a receiver of certain property in controversy. The court said: "If it be the true construction of the order that it required the assignment of other property than the property of the corporation, or property alleged as belonging to it, then the order, in that respect, would be too broad, and wrong. But it does not follow that appellant would be justified in disobeying the order for that reason.

"That would depend upon whether or not the court had jurisdiction. The principle is of universal force that the order or judgment of a court having jurisdiction, is to be obeyed, no matter how clearly it may be erroneous. * * * There was, here, jurisdiction over the parties. The court had power * * * to appoint a receiver, and to place the property of the corporation in the hands of the receiver. The order * * * was made in the exercise of that power, and if the order embraces property not shown by the bill to belong to the" corporation, "this would seem to be but an error in the exercise of jurisdiction." * * *

"The order * * * at the most, was not wholly void, but only in the particular wherein it is complained of as being too broad. Appellant's proper remedy would have been an application to the court to modify the order in that respect. There was no such application. There was no such objection made to the order. * * * There was no offer or willingness ever expressed to execute any requirement to the extent it is not objected to as being too broad."

The remarks of the Supreme Court quoted, are applicable to this case. The plaintiff in error is not shown to have objected below to any part of the original order as being too broad. He never appealed from it, but on the contrary expressly acquiesced in it, and now seeks to avoid the results of his disobedience to every part of it, on the ground that it is in some respects too general, and is not susceptible of performance in all respects.

This he may not do. The original order required him to turn over to the receiver all his property not exempt from execution.

Berkson v. The People.

By a subsequent order the court found that he had in his possession at least the sum of \$7,500 in money, which it was his duty to turn over to the receiver in pursuance of the original order, and that he refused so to do.

The fact that the original order may have been too general in its requirements relating to the delivery by Berkson to the receiver of his books of account, bills, notes, contracts, vouchers, documents, and any other evidences in writing, or documentary matter relating thereto, and to his business, is no justification of a disobedience in the particular that was certain and definite. Order affirmed.

GARY, P. J.

I submit to the authority of the Supreme Court, and acknowledge our obligation to follow their decision in Tolman v. Jones, 114 Ill. 147. But for that decision I should believe that if a court directs, by an order from which no appeal will lie, a party to do what he ought not to be required to do, or makes the order in such vague or uncertain terms that the party can not tell what is required of him, then an order committing him for disobedience or non-performance, is erroneous, and being erroneous, and should be reversed in a direct proceeding to review it. In this case the order appointing a receiver, while appealable under the act of June 14, 1887, was an order of course, that could not be reversed. Edwards v. Rodgers, 41 Ill. App. 405.

But the residue of the order, as to what the then defendant was to do, was not appealable. It could not be reviewed. Lester v. Berkowitz, 125 Ill. 307.

And the court there say, *obiter*, that on review of a judgment for contempt "the propriety of the preliminary or interlocutory order should be considered."

Lester v. People (Ill.) 23 N. E. 387, where the Supreme Court did review the order which was before them in 125 Ill., is not final, as we are informed, being suspended by petition for rehearing pending or granted. On the whole I feel bound to concur in the opinion of Judge Shepard.

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Brady v. The People of the State of Illinois.

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1. **APPEAL—People Cases—Waiver.**—Where a criminal case for a misdemeanor is brought to the Appellate Court by appeal, and the appellee appears and fails to move to dismiss the appeal, the question as to whether an appeal will lie from the Criminal Court, is waived.

2. **CRIMINAL LAW—Continuance to a Third Term.**—Under section 438 of the Criminal Code, the court has no authority to continue a cause to a third term, except it is made to appear by the oath or affirmation of some one, that the witnesses for the State are absent and the materiality of their testimony shown.

Memorandum.—Criminal law. Appeal from the Criminal Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1893, and reversed. Opinion filed April 6, 1893.

The opinion states the case.

DONAHOE & DAVID, attorneys for appellant.

JACOB J. KERN, State's Attorney, for defendant.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT:

This cause has come here by appeal. The appellee having appeared in this court, and not having moved to dismiss the appeal, the question as to whether an appeal will lie from the Criminal Court in a case of this kind, is waived. *Dinet v. The People*, 73 Ill. 183; *Watson v. The People*, 27 Ill. App. 493; *Mohler v. The People*, 24 Ill. 26.

The appellant was indicted and gave bail at the March term, 1891, of the Criminal Court of Cook County, being charged with certain misdemeanors.

Not being brought to trial, he appeared in court at the July term, 1892, and demanded a trial. Trial at that term being denied him he appeared in court again, at the August term, 1892, and demanded trial.

Without any showing being made on behalf of the people

for a continuance to a third term, the court overruled the motion for a trial at the August term, and of its own motion continued the cause until the next, or September term.

On the second day of the September term, appellant again appeared in court and moved to be discharged for want of prosecution, and in support of such motion read his affidavit, wherein, among other things, what occurred in court when the demand for trial was made at the August term, was stated as follows:

“That the court asked the state’s attorney if he wanted the cause continued until the next term, and on receiving an affirmative answer, ordered the case continued; that his attorneys objected to such continuance without a showing being made as required by the statutes. But the court stated that it would require no showing; that neither the state’s attorney, nor any one representing the prosecution made oath or affirmation that the witnesses for the people, or any of them, were absent or unable to be present at the August term, nor did any person state to the court on oath or affirmation, or without oath or affirmation having been made, that the witnesses for the people, or any of them, were absent or unable to be present at said August term, A. D. 1892, of said court.”

That affidavit stands in the record uncontradicted, and must therefore be taken as true. Nevertheless the court overruled appellant’s motion to be discharged.

At a subsequent date in the said September term, the appellant was put on trial, found guilty, and fined \$500.

The record while bringing up the whole cause, particularly challenges the correctness of the ruling of the Criminal Court in refusing to discharge the appellant, when moved thereunto at the September term.

Section 438 of the Criminal Code (Hurd’s Rev. Stat. 1891), is as follows:

“Any person committed for a criminal, or supposed criminal matter, and not admitted to bail, and not tried at or before the second term of the court, having jurisdiction of the offense, shall be set at liberty by the court, unless

the delay shall happen on the application of the prisoner. If the court, at the second term, shall be satisfied that due exertions have been made to procure the evidence for and on behalf of the people, and that there are reasonable grounds to believe that such evidence may be procured at the third term, it shall have power to continue such case till the third term. If any such prisoner shall have been admitted to bail for a crime, other than a capital offense, the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the people of the State are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material."

Here two classes of cases are provided for. One, for persons imprisoned and not admitted to bail, and the other, for persons under bail and not imprisoned. The case at bar belongs to the latter.

It is by virtue only of the statutes of this State, that the offense with which appellant was charged, is made punishable. The same authority entitled him to be discharged under the circumstances prescribed by the section of the statute above quoted.

That the circumstances contemplated by the statute had arisen in the case of appellant seems very clear from a reading of the facts which we have recited.

Fifteen full terms of court had elapsed after his indictment and admission to bail, without any effort having been made by the people to bring him to trial. He then appeared at two successive terms and demanded to be tried, and a trial was denied him without any showing of reason for a further continuance.

Under the last clause of the section of the statute quoted, the court had no authority to continue his cause to a third term, except it was made to appear by the oath or affirmation of some one that the witnesses for the State were absent and the materiality of their testimony shown.

Having demanded trial at two successive terms after the term in which the indictment was returned and bail given,

 Hooven, Owens & Rentschler Co. v. Burdette.

and those terms having elapsed without a trial being granted to him, the appellant was entitled to have been discharged, on his motion therefor on the coming in of court at the next ensuing, or third term, and it was error to put the appellant on trial at that term. *Gallagher v. The People*, 88 Ill. 335; *Watson v. The People*, 27 Ill. App. 493.

The appellant should have been discharged on his motion made at the September term.

The judgment of the Criminal Court will therefore be reversed.

Hooven, Owens & Rentschler Co. v. Burdette.

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1. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*Priority of Payment.***—In the administration of an insolvent estate, it is proper to place the indebtedness incurred by the assignee, and his proper charges as assignee, paramount to the claims of lien holders and general creditors of the insolvent corporation.

2. **ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*Acquiescence in Continuance of Business.***—Where the assignee of an insolvent estate continued business under orders of court, which were known to and acquiesced in by all the lien holders and other creditors, the fair presumption is that the business was continued by the assignee under said orders, with their consent and approval.

3. **ASSIGNEE—*Charges and Expenses—Priority.***—Where an assignee of an insolvent estate carried on the business under an order of court, with the acquiescence of the creditors, *it was held*, that under such circumstances, the court might properly order that the funds in the hands of the assignee should be applied in the first instance to the payment of the assignee's charges, and to indebtedness incurred by the assignee.

4. **INSOLVENT ESTATES—*Priority of Lien, etc.***—An assignee, under the insolvent act, takes no greater rights as against the vendors of property than his assignor, the vendee, had. The only creditor who can attack a lien, valid as between the parties to the purchase and sale, is one who has acquired some lien on, or interest in, the property. Contracts of purchase and sale between the insolvent corporation, vendee, and the vendors, valid as between the parties, are enforceable against the assignee, and the court might properly preserve the liens of the vendors as against all who are mere general creditors.

Memorandum.—Assignment. In the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Appeal from an order direct-

VOL. 51.] Hooven, Owens & Rentschler Co. v. Burdette.

ing priority of payments. Heard in this court at the March term, 1893, and affirmed. Opinion filed May 24, 1893.

The opinion states the case.

REMY & MANN, appellant's attorneys.

TENNEY, CHURCH & COFFEEN, appellee's attorneys.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The first question presented by this appeal is as to the correctness of the order appealed from, in placing the indebtedness incurred by the assignee, and his proper charges as assignee, in the administration of the insolvent estate, ahead of, and paramount to, the claims of lien holders and general creditors of the insolvent corporation.

It seems that the assignee was authorized, by order of the County Court, entered very soon after the assignment was made, to continue the business of the insolvent corporation, and to purchase new material, etc. About a week later the original assignee resigned, and a new one was appointed, and on the same day another order was entered, in substance as follows :

The order recites that it appears to the court that a large number of the creditors of said insolvent had lately met and examined into the affairs of the insolvent, and had concluded that the business ought, for the present, to be continued by the assignee, and that he ought to be allowed to loan to the estate or borrow for the use of said business, such sums of money as may be necessary from time to time to keep up and operate the same, and that having heard the assignee in open court, it is ordered that the assignee be authorized to continue the business as in his own judgment shall be deemed best until the further order of the court, and to advance to the estate or borrow money for the use of the business any such sums as in his judgment may be for the best interests of the estate and the operation and preservation thereof, and to issue receipts or certificates for any sums so used, and that the same shall be paid, with six per cent in-

terest, out of any money which may come into his hands as assignee, and the same shall be a valid and first lien upon any of the property or effects or proceeds thereof belonging to said estate, or which may come into the hands of any assignee; not affecting, however, any equitable or other right or lien now held by any other party.

Acting in pursuance of said order and without objection, to the court, by any of the creditors, the assignee continued the manufacturing business of the insolvent corporation for several months, at a large loss, and finally all the tangible property of the estate was sold.

On the question of distribution of what is left of the estate in the hands of the assignee, which is insufficient to pay the assignee's indebtedness incurred in running the business under the orders of the court, and the liens established by the County Court in favor of certain creditors of the estate, the controversy has arisen.

The lien holders on the one hand claim that the order appealed from is erroneous in subordinating their claims to the assignee's indebtedness and charges; and the general creditors, who otherwise will get nothing, insist that the order is erroneous in giving the lien holders any priority whatever, and that they should be treated as general creditors only.

So far as the record shows, the order under which the assignee continued the business was known to and acquiesced in by all the lien holders and other creditors, and the fair presumption from the recitals therein, and the subsequent proceedings in court, is that the business was continued by the assignee, under said orders, with their consent and approval.

The business was a newly established and extensive manufacturing concern, and it was not an unreasonable hope and expectation on the part of all interested, that if kept as a going concern, more could be made for the creditors, including the lien holders, than if closed down.

It is not claimed that the management of the receiver was not an honest one, or that his expenses of administration of

the estate were unnecessarily large, or were injudicious, except that a loss resulted.

Under such circumstances the court properly ordered that the funds in the hands of the assignee should be applied in the first instance to the payment of the assignee's charges and to the indebtedness incurred by the assignee. *Heise v. Starr*, 44 Ill. App. 406; *High on Receivers* (2d edition), Secs. 796, 398c, 398d.

The fact that particular parts of the property conveyed to the assignee by the deed of assignment were covered by liens in favor of certain of the creditors, did not affect the duties of the assignee to those particular pieces of property. The legal title to all the property passed to the assignee, and he was charged with the preservation of it all. The lien holders never obtained from the court any order either granting or denying their petitions filed with reference to the property upon which they claimed liens, but apparently rested content with the reservation of the equitable right or lien of all parties expressed at the conclusion of the order authorizing the receiver to carry on the business. We do not see that such reservation gives them any right to claim exemption from the burdens incident to the execution of that order by the assignees.

The most that can be claimed for it is protection against the lien of certificates which might be issued by the assignee for borrowed money, of which there are none, and the claims of general creditors of the estate, which the order appealed from, protects them against.

The order approving the sale of all the property, entered January 3, 1893, provided that the liens which should be found to exist should be transferred from the property to the fund derived from the sale, but did not operate to enlarge the liens. To just the extent that the property sold was chargeable with the burdens of its preservation and management as a part of the entire property, the fund realized from its sale was chargeable.

The next question is the one that is raised by the general creditors denying the right of the so-called lien-holders to a preference over them. From the record it can hardly be

questioned that as between the insolvent corporation and the lien holders, the latter were entitled to a lien upon the particular properties sold by them to the insolvent. That being so, it is well settled law that the assignee took no greater rights as against the vendors than his assignor, the vendee, had. The only creditor who can attack a lien, valid as between the parties to the purchase and sale, is one who has acquired some lien on, or interest in, the property. There is no such creditor here. The contracts of purchase and sale between the insolvent corporation, vendee and the vendors, lien holders, were valid as between the parties, and were enforceable against the assignee, and the court properly preserved the liens of the vendors as against all who were mere general creditors.

The order of the County Court should be affirmed.

WATERMAN, J.

I assent to the affirmance of the order of the County Court, because it does not appear that appellants, before the assignee had incurred the indebtedness by which the estate is substantially devoured, pressed upon and obtained from the court a decision upon their petition for a surrender to them of the goods they had sold in accordance with their equitable claim thereto.

The filing of a petition does not necessarily give a court any knowledge of the contents thereof. No court can be presumed to be aware of what is contained in papers filed with it, unless its attention is specially directed thereto, and it required to make an order thereon.

When the case shall be presented that a party holding the equitable title to property, claims the same from the assignee of an insolvent debtor, and filing his petition for an enforcement of his equitable rights, the County Court shall deny the same, and the assignee shall seek to have the general expenses of administration, thereafter incurred, charged upon the proceeds of such property, the equitable title to which shall be found to have been in such petitioner, a case will be presented in which the decision in this case will not be, as I understand, authority.

Clough et al. v. Kyne et al.

1. **BILL OF EXCEPTIONS**.—*Certificate that it Contains all of the Evidence.*—Where the certificate of the trial judge to the bill of exceptions does not purport to say that nothing else than what appears in the bill of exceptions, as presented to this court, was presented by way of evidence to the court below, it will be presumed that there was other evidence heard on the trial sufficient to justify the judgment of that court.

Memorandum.—Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1898, and affirmed. Opinion filed May 24, 1898.

The opinion states the case.

OSBORNE BROS. & BURGETT, attorneys for appellants.

RUNYAN & RUNYAN, attorneys for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Under the well-settled rule that where the certificate of the trial judge to the bill of exceptions does not purport to say that nothing else than what appears in the bill of exceptions, as presented to this court, was presented, by way of evidence, to the court below, it will be presumed that there was other evidence heard on the trial sufficient to justify the judgment of that court. *Elkins v. Wolfe*, 44 Ill. App. 376, and cases there cited; *Hall v. Cox*, 44 Ill. 382.

The original bill of exceptions was made a part of the record in this court, by stipulation of parties, and a careful examination of it fails to reveal any words anywhere, from which we may see, or infer, that it contains all the evidence. The legal presumption referred to, therefore, arises and binds us.

The judgment of the Superior Court will therefore be affirmed.

Scott v. McMenamin.

Scott et al. v. John McMenamin, a Minor, etc.

1. **NEGLIGENCE—Of Infants.**—Where the question of the negligence of an infant arises, the circumstances in evidence are always to be taken into consideration, and the inquiry is whether the minor exercised such care as, under the circumstances, might be expected from one of his age and intelligence.

2. **NEGLIGENCE—Duty of Master.**—The duty of a master is to use reasonable and ordinary care not to subject his servant to extraordinary and unreasonable danger.

Memorandum.—Action for personal injuries. In the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the March term, A. D. 1893; reversed and remanded. Opinion filed June 20, 1893.

APPELLANTS' BRIEF, PARTRIDGE & PARTRIDGE, AND DUNCAN & GILBERT, ATTORNEYS.

It has been so often affirmed and is so well established, that the master is not guarantor of the safety of machinery which he puts into the hands of his servants, and is responsible only when he has failed to employ reasonable care and skill in its selection, that we content ourselves with a reference to a few recent cases recognizing the principle. Cooley on Torts, p. 557, Note 1.

“As respects his duty toward an employe in his service, the employer is not bound to provide absolutely safe machinery. The law imposes upon the employer only the obligation to use reasonable and ordinary care and diligence in providing suitable and safe machinery.” *Camp Point Mfg. Co. v. Ballou, Admr.*, 71 Ill. 417-421; see also, *Chicago, R. I. & P. Ry. Co. v. Lonergan*, 118 Ill. 48; *Shearman & Redf. on Neg.*, Sec. 87.

MORRIS ST. P. THOMAS and W. S. JOHNSON, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee, employed by appellants to run an elevator in their store, and directed by them to keep the "cab" clean, was injured while standing in a shaft, by the descent of the weights belonging to another elevator. He was at the time engaged in cleaning the cab of the elevator of which he had charge.

Appellee appears to have been sixteen years old at the time of the accident; he had lived upon a farm in New York State, and in De Kalb County, Illinois, and had been in charge of this elevator from the middle of December, 1889, until the following first of February, when he was injured.

There was a good deal of evidence bearing upon the question of whether the plaintiff in respect to the duty and situation which led to the accident, had exercised such care and caution as was to be expected from a person of his years and intelligence; and upon this subject it was important that the jury should be correctly instructed.

Upon this, at the instance of appellee, the court gave the following instruction:

"2. The jury are instructed that in determining the relative degrees of care, or want of care, manifested by the parties at the time of the injury in this case, the age and discretion of the plaintiff, John McMenamin, are proper subjects of inquiry for the jury. The law does not require that a person of the age of John McMenamin shall exercise the same degree of care and caution as a person of maturer years, but only such care and caution as a person of his age, intelligence and discretion, would naturally and ordinarily use under like circumstances."

Where the question of the negligence of an infant arises, the circumstances in evidence are always to be taken into consideration, and the inquiry is whether the minor exercised such care as under the circumstances might be expected from one of his age and intelligence. *City of Chicago v. Keefe*, 114 Ill. 222, 229.

The statement that the law "does not require that a per-

Rice & Bullen Malting Co. v. Paulsen.

son of the age of John McMenamin shall exercise the same degree of care and caution as a person of maturer years," even in connection with what followed, was, to say the least, misleading; and the same may be said of the expression, "at the time of the injury;" the matter under consideration, in this regard, was more especially the care exercised when the plaintiff went into the place of danger.

The following was also given at the instance of appellee :

"The jury are instructed, as a matter of law, that it was the duty of the defendants, so far as practicable, to furnish the plaintiff a reasonably safe place in which to do the work for which he was employed."

The duty of a master is to use reasonable and ordinary care not to subject his servant to extraordinary and unreasonable danger. C., R. I. & P. R. R. Co. v. Lonergan, 118 Ill. 49; Chicago Rolling Mill Co. v. Monka, 4 Brad. 664; Heyer v. Salsbury, 7 Brad. 93; Cooley on Torts, 557, Note 1.

The vice of the instruction consists not so much in it as a proposition of law, as in its inapplicability to the case under consideration.

The judgment of the Superior Court is reversed and the cause remanded.

The Rice and Bullen Malting Company v. Paulsen.

1. MASTER AND SERVANT—*Duty of Employer*.—It is the duty of an employer to use reasonable diligence to secure for the use of his employes, safe appliances with which to prosecute their work.

2. MASTER AND SERVANT—*Rights of an Employee*.—An employe has a right to act upon the theory that his employer has used reasonable diligence to provide safe appliances, and, himself exercising ordinary care, if his attention has not been called to a defect or danger, and the same is not obvious, he is not chargeable with notice of insecurities which could only be discovered by a careful inspection.

3. FELLOW-SERVANTS—*Notice of Defect in Muster*.—If an injury is due to the negligence of a fellow-servant, the master having had notice of the defect from which the accident occurred, the rule that the employe assumes the risk of injury from the acts of fellow-servants, does not apply.

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51	123
87	621
51	123
93	1215
51	123
96	291

4. CARE AND NEGLIGENCE—*Obligation to Use Reasonable Care Can Not Be Delegated—Fellow-Servants.*—The obligation to use reasonable care in furnishing appliances for the use of employees, is one that can not be delegated so as to absolve the master from responsibility for negligence, and if such care is not used, and the servant is injured because of insufficient and unreasonably insecure appliances, he, having no notice of the defective condition, may recover notwithstanding the defect arose from the negligence of a fellow-servant.

Memorandum.—Case. In the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Declaration for personal injuries; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the March term, A. D. 1893, and affirmed. Opinion filed June 14, 1893.

The opinion states the case.

W. J. DUNNE, attorney for appellant.

No appearance for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee was injured while working for appellant in the construction of a malt elevator. The circumstances attending his injury were, that in descending from a bin upon which he was at work as a carpenter, he being upon a scaffold, laid down upon it, and holding to the outer plank thereof, endeavored to reach with his feet a ladder below, by which workmen went up and down; that while thus doing, the plank to which he was holding, not being fastened, slipped off and he fell with it, breaking his leg. The scaffold was constructed by appellant for the use of its workmen engaged upon the elevator.

There was evidence that appellant's foreman, on the morning of the accident, had been told that the scaffold was not fit for use, one of the planks having tipped when stepped upon by another employe. It seems to have been constructed not by the carpenters there employed, but by laborers working under the direction of a foreman.

The ladders and scaffolds were built up and placed as the

Rice & Bullen Malting Co. v. Paulsen.

work progressed. There were inside the bin, upon which plaintiff was at work, iron steps by which he might have descended.

The jury returned a verdict of \$1,000 for the plaintiff. Upon this there was judgment, from which this appeal is prosecuted.

It is the duty of an employer to use reasonable diligence to secure for the use of his employes reasonably safe appliances with which to prosecute their work. *Wood on Master and Servant*, Sec. 229; *Shearman & Redfield on Negligence*, Sec. 87, 92; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417.

In the present case the master was informed that the platform supplied for the use of the plaintiff was dangerous, while appellee does not appear to have had any notice of its defective condition. True, he might by a careful inspection have ascertained that the plank he took hold of was unfastened, but there was no evidence that impresses us that under the circumstances, a failure so to do was a neglect to exercise ordinary care. An employe has a right to act upon the theory that his employer has used reasonable diligence to provide reasonably safe appliances, and, himself exercising ordinary care, if his attention has not been called to a defect or danger, and the same is not obvious, he is not chargeable with notice of insecurities which could only be discovered by a careful inspection. *Wood on Master and Servant*, Sec. 332-385; *Patterson v. Pittsburg R. R. Co.*, 76 Penn. St. 389; *Fort Wayne R. R. v. Gildersleeve*, 33 Mich. 138; *Tudor Iron Works v. Weber*, 31 Ill. App. 306.

Even if, as is urged, the injury to appellee was due to the negligence of a fellow-servant, the master having had notice of the defect from which the accident occurred, the rule that the employe assumes the risk of injury from the acts of fellow-servants, does not apply. *Chicago & N. W. R. R. Co. v. Sweet*, 45 Ill. 197; *Chicago, C. & I. C. C. R. R. Co. v. Troesch*, 68 Ill. 545; *Noyes v. Smith*, 28 Vt. 59; *Pullman Palace Car Co. v. Laack*, 41 Ill. App. 34; *same v. same*, 32 N. E. 285; *Chicago Consolidated Bottling Co. v. Milton*, 41 Ill. App. 154, 156.

The obligation to use reasonable care in furnishing appliances for the use of employes, is one that can not be delegated so as to absolve the master from responsibility for negligence in this regard, and if such care is not used, and the servant is injured because of insufficient and unreasonably insecure appliances, he, having no notice of the defective condition, may recover, notwithstanding the defect arose from the negligence of a fellow-servant. Pullman Palace Car Co. v. Laack, *supra*; Tudor Iron Works v. Weber, *supra*.

While it is true that appellee might have descended by the steps inside the bin, it does not appear that such mode of descent had been pointed out to him as the one to use, while it was shown that the way he made use of, was one intended by appellant for his use, and one which appellant knew its employes were making use of.

The court might properly have given some of the refused instructions asked by appellant; yet, taking the instructions given, as a whole, we think that they fairly presented the law applicable to the case; the damages are not excessive, and the judgment of the Circuit Court is affirmed.

Anna Monteath v. Robert Monteath.

1. **DIVORCE—Willful Desertion.**—The statute assigns as one of the causes for divorce, that either party "has willfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years;" but it does not require that, during these two years, the deserted wife shall be all the time willing and ready to receive and live with the erring husband.

Memorandum.—Divorce. In the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Appeal from a decree of the Circuit Court dismissing the bill. Heard in this court at the March term, 1893. Reversed and remanded, with directions. Opinion filed April 19, 1893.

The opinion states the case.

Monteath v. Monteath.

KING & GROSS, attorneys for appellant.

No appearance for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant, on the 11th day of October, 1892, filed her bill asking for a divorce from appellee. She clearly proved the alleged marriage, and that appellee, without any reasonable cause, deserted her when she was about to become the mother of his child; and also that appellee had not since returned, contributed toward her support, or communicated with her.

Having shown this much, appellant, upon being interrogated by the court, said: "My husband left me in November, 1889. I would not be willing to live with him if he returned, under the conditions he left me in. I would not be willing to live with him now. I would not live with him if he returned and provided a home for me and the child."

Question: "Now, up to the time you had a right to a decree under the law, would you have been willing to live with him if he had returned and provided a home for you and the child?" A. "No, I never want to see him again; he never made an offer to me since he deserted me, up to the present time, to provide a home for me, or to maintain me or my child."

Thereupon the court declined to hear further evidence, and of its own motion dismissed the complainant's bill for want of equity.

This action of the court seems to have been predicated upon the opinion that the state of mind of the complainant at the time of hearing this cause, December 17, 1892, her feeling at that time toward her husband, and her unwillingness to receive and live with him, was a matter to be taken into consideration in determining whether she had made out a case entitling her to a divorce.

The statute assigns as one of the causes for divorce that either party "has willfully deserted or absented himself or

herself from the husband or wife, without any reasonable cause, for the space of two years;" it does not require that during these two years the deserted wife shall be all the while willing and ready to receive and live with the erring husband.

The question involved in such a case as this is not what was the state of feeling of the wife toward her husband during the period of desertion, but what has the husband done which constitutes, under the statute, a willful desertion, without any reasonable cause, for the period of two years. There was in this case nothing tending to show that the desertion was with her consent or by arrangement, or that the husband had absented himself with an intent to return, or with any intent other than that shown by his acts.

Under such circumstances, how she may have, during the statutory two years or thereafter, felt toward him, is immaterial. What she might have done had he returned, is entirely conjectural; she may now be entirely mistaken as to what she would have done under such circumstances. No person knows what he would have done under conditions in which he was never placed.

The decree of the Superior Court is reversed and the cause remanded, with directions to hear the complainant's case and to render a decree therein upon the pleadings and evidence, not inconsistent with this opinion.

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World's Columbian Exposition Co. v. Brennan.

1. CITY AND VILLAGES—*Control Over Streets*.—The control over the streets of a city to open, close or permit obstructions of them in the interest of the public, for whose use they exist, is, under certain regulations, in this State, vested in the city government.

2. CITY AND VILLAGES—*Vacating or Obstructing Streets—Special Damage*.—If the property owner sustain special damage by reason of the acts of the city authorities in vacating or obstructing a street, the statute provides a means by which such damage may be ascertained and he obtain compensation therefor.

World's Columbian Exposition Co. v. Brennan.

3. *STREETS—Rights of Abutting Owner.*—An owner has not a right to the perpetual maintenance of a street upon which his property abuts; although he may be entitled to recover damages because of the vacation of the street by the municipal authorities.

4. *INJUNCTIONS—Object of Interlocutory, etc.*—The sole object of an interlocutory injunction, is to preserve the subject in controversy in the condition it then is. It can not be used for the purpose of compelling the defendant to undo what he has already done.

5. *INJUNCTIONS—Appropriate Functions—Preventive Relief.*—The appropriate function of an injunction is to afford preventive relief, not to restore parties to that of which they have already been deprived.

Memorandum.—In chancery. In the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding. Bill for injunction. Appeal from an order granting the same. Heard in this court at the March term, A. D. 1893, and reversed. Opinion filed March 18, 1893.

The opinion states the case.

APPELLANT'S BRIEF, WALKER & EDDY, ATTORNEYS.

The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered. It can not be used for the purpose of taking property out of the possession of one party and putting it into the possession of another, nor does it go to the extent of ordering defendant to undo what he has already done, since it might thereby be productive of as much injury to defendant as that of which the party aggrieved complains. The jurisdiction, therefore, being exercised to prevent the further continuance of injurious acts, rather than to undo what has already been done, on an interlocutory application for an injunction, courts of equity will only act prospectively, and will interpose only such restraint as may suffice to stop the mischief complained of and preserve matters *in statu quo*. High, Injunctions, Sec. 4; Murdock's Case, 2 Bland, 461; Bosley v. Susquehanna Canal, 3 Bland, 63; Farmers R. Co. v. Reno, O. C. & P. R. Co., 53 Pa. St. 224; Washington University v. Green, 1 Md.

VOL. 51.] World's Columbian Exposition Co. v. Brennan.

Ch. 97; Audenried v. Philadelphia & R. R. Co., 68 Pa. St. 370; Blakemore v. Glamorganshire, etc., 1 Myl. & K. 154.

JAMES P. ROOT, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee filed in the Circuit Court a bill alleging that he is the lessee of fifty feet on the southeast corner of Stony Island avenue and 68th street, and has thereon commodious buildings, in which he carries on the saloon and restaurant business, and also rents to lodgers rooms above those in which his saloon and restaurant is situated; that for more than fifteen years last past, 68th street has been an open public highway, and that Stony Island avenue is one of the leading north and south public thoroughfares; that the greater portion of his business is derived from persons who pass along 68th street in front of his premises; that on the 23d of January, 1893, the common council of the city of Chicago passed an ordinance by which an attempt is made to close up 68th street, and prevent its enjoyment by him, the said complainant, and that thereupon the World's Columbian Exposition Company, proceeded to, and did obstruct said 68th street, by erecting across the same a tight board fence eight feet high, about twenty-four feet from his, complainant's, said premises; whereby his business has been greatly injured and his property greatly depreciated in value. The complainant therefore prayed that the city of Chicago and the World's Columbian Exposition Company be perpetually enjoined and restrained from further obstructing the said 68th street by the continuance of said fence or otherwise, and that they be commanded to remove said fence, to the end that 68th street shall be and remain an open and free public highway.

The Columbian Exposition Company answered the bill, admitting that it had temporarily closed up 68th street, as alleged; that the same was done in pursuance of an ordinance of the city of Chicago, whereby it, said Exposition

Company, was given leave, temporarily, to close up the said street, such closing being necessary for the proper carrying on of a great public enterprise in which it is engaged, and essential to the safety of the public.

Upon the coming in of the answer, the court entered an interlocutory order, enjoining the city of Chicago and the World's Columbian Exposition Company, until the further order of the court, from obstructing 68th street between Stony Island avenue and the waters of Lake Michigan, "with the fence now there, or any other illegal obstructions," and from preventing the use of 68th street by the general public.

The control over the streets of a city to open, close or permit obstructions of them in the interest of the public, for whose use they exist, is, under certain regulations, in this State, vested in the city government. *Cairo & V. Ry. Co. v. People*, 92 Ill. 170; *Chicago and Union Bldg. Assn.*, 102 Ill. 379; *Meyer v. Village of Teutopolis*, 131 Ill. 552; *Carney v. Marseilles*, 136 Ill. 407.

If the property owner sustains special damage by reason of the acts of the city authorities in vacating or obstructing a street, the statute provides a means by which such damages may be ascertained, and he obtain compensation therefor. An owner has not a right to the perpetual maintenance of a street upon which his property abuts, although he may be entitled to recover damages because of the vacation of the street by the municipal authorities. *Meyer v. Village of Teutopolis*, *supra*; *Dillon on Municipal Corporations*, Sec. 666.

In the present case the obstruction complained of, it appears, is designed by all the defendants to be only of a temporary character, and such obstruction also appears, from a consideration of the bill, answer and affidavits presented to the court, to have been necessary to the safety of the public.

Without reference to what relief the complainant might have been entitled to on a final hearing, his bill presented no case for an interlocutory injunction. The obstruction complained of was already existing, and the court had no

power by an interlocutory order to compel its removal. The sole object of an interlocutory injunction, is to preserve the subject in controversy in the condition it then is; it can not be used for the purpose of compelling the defendant to undo what he has already done. *High, Injunctions*, Sec. 4; *Murdock's Case*, 2 *Bland*, 461; *Bosley v. Susquehanna Canal*, 3 *Bland*, 63; *Farmers' R. Co. v. Reno, O. C. & P. R. Co.*, 63 *Pa. St.* 224; *Washington University v. Green*, 1 *Md. Ch.* 97; *Andenried v. Philadelphia & R. R. Co.*, 68 *Pa. St.* 370; *Blakemore v. Glamorganshire, etc.*, 1 *Myl. & K.* 154.

The appropriate function of an injunction is to afford preventive relief, not to restore parties to that of which they have already been deprived. *High on Injunctions*, Sec. 23; *Wangelin v. Goe*, 50 *Ill.* 459; 2 *Story's Eq. Jurisprudence*, Sec. 861; *Dunning v. City of Aurora*, 40 *Ill.* 481; *Menard et al. v. Hood*, 68 *Ill.* 121; *Fisher v. Board of Trade*, 80 *Ill.* 85; *Baxter v. Board of Trade*, 83 *Ill.* 146; *Clark v. Donaldson*, 104 *Ill.* 639; *Atty. Genl. v. New Jersey R. R. Co.*, 2 *Green's Ch.* 136.

The order of the court below, enjoining the defendants, is reversed.

Bucklen v. Hasterlik.

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1. **FORFEITURE**—*In Courts of Equity*.—It is undoubtedly a rule with courts of equity not to enforce either a penalty or a forfeiture.

2. **TAXES**—*Presumption of Payment by Owner*.—Where it appears by an abstract of title, that for more than forty years lands have not been sold or forfeited for taxes, save for those of two years, and that during this period there has been but one record title to such lands, and no title adverse known to have been held or asserted, a fair presumption arises that the taxes upon such premises have, during such term, been paid by those claiming under such record title.

3. **CONVEYANCES**—*Ancient Deeds*.—Deeds of conveyance forty years old, are entitled to be considered as ancient documents, of the execution of which no further proof is required.

4. **ANCIENT DOCUMENTS**—*Proof*.—It is enough to entitle a document to be admitted in evidence to show that it bears upon its face marks of having been executed at least thirty years before, and that it comes from the custodians who would have possession of it if it were genuine. Such a document proves itself.

Bucklen v. Hasterlik.

5. *DEEDS—Proof of Ancient Deeds.*—To entitle a deed to be admitted, some evidence in addition to proof of antiquity is required. Where possession has accompanied it, that of itself furnishes sufficient evidence of its authenticity to entitle it to be read without further proof, if it be more than thirty years old; possession is not, however, essential to admissibility; other things equivalent to it, or explanatory matter clearly indicating ownership may justify its admission.

6. *ABSTRACT—Title Free from Reasonable Doubt.*—Where an abstract of title showed several deeds for more than forty years recorded in the proper office, and numerous recorded transactions of large importance running through a period of many years under them, the taxes having apparently been paid by the claimants thereunder, and no hostile title being shown to have ever existed or been asserted, *it was held*, that so far as these deeds were concerned the abstract showed a title free from reasonable doubt.

7. *CONTRACT—Waiver of Provisions by an Attorney.*—An attorney, as such, has no power to waive the requirements of a contract and make a new bargain for his client; so held where a contract required the furnishing of an abstract showing a title free from material defects, and a conveyance of a good title, free from reasonable doubts.

8. *TENDER OF A DEED—When Unnecessary.*—Where a vendee objects to the title, a tender of a deed, which he declares he will not accept, is unnecessary.

9. *INTERPLEADER—Effect on the Original Parties.*—When an interpleader is awarded, the original complainant is out of the case, and the defendants should make their claims against each other by such allegations and offers as if they were original litigants.

10. *ABSTRACT—Objection to Must Be Made in Apt Time.*—An objection that an abstract of title is not such a one as a party is bound to furnish should be made within a brief time after the same is submitted for examination.

Memorandum.—Bill of interpleader. In the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Appeal. Heard in this court at the March term, 1893, and affirmed.

The statement of the facts is contained in the opinion of the court.

APPELLANT'S BRIEF, SMOOT & EYER, AND MONK & ELLIOTT,
ATTORNEYS.

Appellant contended that a court of equity could offer appellee no relief without aiding in a forfeiture, a thing it will never do. *Livingston v. Tompkins*, 4 Johns. Ch. 416; *Marshall v. Vicksburg*, 82 U. S. 149; *McCormick v. Ross*, 70

Cal. 474; *White v. R. R. Co.*, 13 Mich. 356; *Crane v. Dwyer*, 9 Mich. 380; *Fitzhugh v. Maxwell*, 34 Mich. 138; *Mills v. Evansville Seminary*, 47 Wis. 354; 52 Wis. 669; *Clark v. Drake*, 3 Chand. 253; *Vale v. Drexel*, 9 Brad. 446.

Possession of unincumbered title at a time fixed for completion of a contract and of a deed duly signed and ready for delivery, were conditions precedent, without performance of which appellant could not be called upon to do anything. Willingness to remove the incumbrance was only willingness to get ready, and did not show ability and readiness of appellee to perform at the time. *Tyler v. Young*, 2 Scam. 445; *Bank of Columbia v. Hagnar*, 1 Pet. 455; *Conway v. Case*, 22 Ill. 127; *Morange v. Morris*, 3 Keyes, 48; *Williams v. Healy*, 3 Denio, 364; *Bigler v. Morgan*, 77 N. Y. 312.

Mere antiquity of a deed is not a sufficient proof of its execution. *Smith v. Rankin*, 20 Ill. 14; *Wilson v. Betts*, 4 Denio 201; *Havens v. Seashore Land Co.* (N. J.), 20 Atl. Rep. 497; *Cowan and Hill's Notes to Phillips' Evidence*, 2d vol. pp. 475-480.

APPELLEE'S BRIEF, MORAN, KRAUS & MAYER, ATTORNEYS.

The title of real estate need not, like Cæsar's wife, be above suspicion. The objection must be something more than a mere speculation or theory. It can not be based on captious, frivolous, and astute niceties, but must be based upon such defect as produces a real *bona fide* hesitation in the mind of the chancellor. *Lord Eldon in Stapleton v. Scott*, 11 Ves. 27; see, also, *Close v. Stuyvesant*, 132 Ill. 619.

In *Leake's Law of Contract*, p. 579, it is said: "Performance of a condition is excused by the refusal of the other party to accept it. The party must show that he was ready; but if the other party stop him, on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act." See, also *Hunter v. Daniel*, 4 Hare 420; *Lyman v. Gedney*, 114 Ill. 388; *Jones v. Barkley*, 2 Doug. 685; *Shepler v. Green*, 31 Pac. Rep. 42; *Webster v. French*, 11 Ill. 254.

Bucklen v. Hasterlik.

The reason why a court of equity entertains a bill of interpleader is not that the claims of the conflicting claimants are of equitable cognizance, but rather that the complainant is in danger of being compelled, by separate actions at law, or part at law and part in equity, to render the same debt or duty to different parties. Daniel, Chancery Practice, 1560.

The equitable jurisdiction of the court is invoked for the protection of the stakeholder, and not for the purpose of determining the rights among conflicting claimants, and it is only where the conflicting claims are all legal, or part legal and part equitable, that a bill of interpleader may be filed. Such a bill can not be filed where the conflicting claims are all of equitable cognizance. Barclay v. Curtis, 9 Price's Repts. 661; Sturgess v. Claude, 1 Dowl. 305; Roach v. Wright, 8 M. & W. 155; Simon's Interpleader, 3-4.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

On the 27th of April, 1891, a written contract for the purchase of certain real estate located in Chicago, Illinois, by Bucklen from Hasterlik was signed by the parties, Hasterlik signing for himself and Bucklen by H. S. Merritt & Co., agents.

The contract is as follows:

"This memorandum witnesseth that Charles Hasterlik hereby agrees to sell, and Herbert E. Bucklen agrees to purchase, at the price of \$16,950, the following described real estate, situated in Cook county, Illinois: The north one hundred and fifty (150) feet of the west half of block 4, in Charles Busby's subdivision of the south half of the southeast quarter of the northwest quarter of section 10, township 31 north, range 14 east of the principal meridian. Subject to all taxes and assessments levied after the year 1890, and unpaid special assessments levied for improvements not yet made.

Said purchaser has paid \$1,000 as earnest money, to be applied on said purchase when consummated, and agrees to

pay within five days after the title has been examined and found good, the further sum of \$5,000, at the office of Jay Dwiggins & Co., Chicago, provided a good and sufficient warranty deed, conveying to said purchaser a good title to said premises, with waiver and conveyance of any and all estates of homestead therein, and all rights of dower, inchoate or otherwise (subject as aforesaid), shall then be ready for delivery. The balance to be paid as follows: \$3,650 on April 27, 1892; \$3,650 on April 27, 1893; \$3,650 on April 27, 1894, with interest from this date at the rate of six per cent per annum, payable semi-annually, to be secured by notes and mortgage or trust deed, of even date herewith, on said premises, in the form ordinarily used by Jay Dwiggins & Co. A complete abstract of title, or merchantable copy, to be furnished within a reasonable time, with a continuation thereof brought down to cover this date. In case the title, upon examination, is found materially defective within ten days after said abstract is furnished, then, unless the material defects be cured within sixty days after written notice thereof, the said earnest money shall be refunded and this contract is to become inoperative.

Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vendor, be forfeited as liquidated damages, including commissions payable by the vendor, and this contract shall become null and void. Time is of the essence of this contract and all of the conditions thereof.

This contract and the said earnest money shall be held by International Bank for the mutual benefit of the parties hereto.

In testimony whereof, said parties hereto set their hands this 27th day of April, A. D. 1891.

CHARLES HASTERLIK.

HERBERT E. BUCKLEN.

Per H. S. Merritt & Co., Agts."

On that day the contract was signed, and immediately upon its signature, Merritt, and Elmer Dwiggins, a real estate

Bucklen v. Hasterlik.

agent representing Hasterlik, went to the International Bank where the contract and a certified check drawn by Bucklen on the Fort Dearborn National Bank of Chicago, of the same date as the contract for \$1,000, were deposited. The contract and check were sealed in an envelope, across the back of which Merritt and Hasterlik wrote their names. On the back of the envelope was also indorsed :

“Chicago, April 27, 1891. Deliver only on joint request of Charles Hasterlik and H. S. Merritt & Company, agents of H. E. Bucklen.”

Shortly after the execution of the contract an abstract of title was delivered by Hasterlik to Merritt and by him handed to K. R. Smoot, Bucklen's attorney, for examination. Smoot objected to the title, and in response to a request by appellee's attorneys to put his objections in writing, made a written statement containing the following objections :

First. That certain deeds in the chain of title were insufficiently acknowledged, to-wit: One from Zaphna Lake and wife to Nathan C. Hills, dated March 22, 1843; one from Nathan C. Hills and wife to Isaac Loomis, dated July —, 1843; and one from Isaac Loomis to John P. Emerson, dated February 2, 1846.

Second. The uncertainty of description in the “Carter” conveyance.

Third. That there was outstanding against the property an incumbrance to the amount of \$7,000, dated April 17, 1890, made by Hasterlik, and unpaid.

Fourth. Taxes for the year 1890, upon said premises and special assessments.

Hasterlik's attorneys replied June 10, 1891, claiming that the objections to the title were not well taken; and by reference to the statutes of the State in which the several acknowledgments were taken, and citations therefrom, endeavored to convince Smoot of the sufficiency of the proof of the execution of these deeds; they also endeavored to demonstrate that there was no uncertainty in the description in the “Carter” conveyance, and also stated that the incumbrance

for \$7,000 would be released when Bucklen notified his willingness to complete the purchase, and that the taxes for 1890 had been paid, referring Smoot to the record for a verification of their statement. A number of letters passed between the attorneys of the respective parties, Mr. Smoot finally insisting upon his objection to the title, and refusing to yield in the matter.

Thereafter, July 22, 1891, a bill was filed in the Circuit Court of Cook County, by Hasterlik against Bucklen and the International Bank, asserting his right to the \$1,000 earnest money, alleging that Bucklen had failed to comply with his contract, and that he, Hasterlik, had elected to demand said earnest money as liquidated damages. The prayer was that the money be paid to him, and that said contract be annulled.

Matters remained in this situation until November 4, 1891, when the bank filed its bill of interpleader, making Hasterlik, Bucklen and Merritt, parties defendant, and praying that the parties might be required to litigate with each other their right to said fund. Answers were duly filed by Hasterlik and Bucklen, each claiming the fund. Whereupon the court entered a preliminary decree, finding that the bill of interpleader had been properly brought; and ordering the complainant to pay the \$1,000, less \$75 solicitors' fees and \$9 court costs, into court. Upon the hearing of the matters in issue between the claimants, a final decree was entered February 6, 1893, awarding the earnest money to Hasterlik. Bucklen appeals from this decree.

Appellant insists that no complete agreement was ever made, because the written contract, together with a check for \$1,000, was given in escrow to the International Bank, to be delivered only upon the joint order of the contracting parties. Appellant does not deny the authority of Merritt & Co. to make a contract for him, but insists that the delivery in escrow subject to a joint order, left the instrument one which could be enforced only when a joint order for delivery had been made. The evidence shows that prior to the written contract being placed with the check in escrow, it was delivered and treated by both parties as a

Bucklen v. Hasterlik.

completed instrument; and appellant, by all his subsequent acts, recognized it as such. His demand for the check was not placed upon any insistence that a contract had never been made, or if made had been recalled by a placing in escrow, but such demand is by the terms thereof, based upon his assertion that Hasterlik had failed to comply with the contract, and that it "has" become inoperative.

It is also urged that the suit of appellee was, and the decree of the court below is, a proceeding to enforce a forfeiture, which is a thing that a court of equity will not do. It is undoubtedly a rule with courts of equity not to enforce either a penalty or a forfeiture. 2 Story's Eq., Sec. 1319; Vale v. Drexel, 9 Brad. 446; Hornburg v. Baker, 1 Peters 232-236; Popham v. Bumpfield, 1 Ver. 339; Livingston v. Tompkins, 4 Johns. Ch. 416-431; Smith v. Jewett, 40 N. H. 530.

If the decree of the Circuit Court is to be considered as the mere enforcement of a forfeiture, it can not be sustained.

If appellant unjustifiably refused to carry out his contract and if appellee did all that was of him required, then appellee was entitled to recover, and have from appellant such damage as in consequence of such breach he, appellee, had sustained.

It appeared upon the hearing that there had been, since making of the contract, a decline of ten per cent in the value of the property in question. This amounts to much more than \$1,000. We think that for the purposes of a court of equity, such proof of a decline in the value of the property sold, was sufficient to establish that appellee had sustained damage to more than the amount of the decree; and that the award of the court below was not the enforcement of a penalty or forfeiture, but the giving of compensatory damages shown to have been actually sustained.

We come, therefore, to a consideration of the principal question in the case, viz.: Was the title shown by the abstract such a one as appellee, under the contract, was bound to accept?

Objection was and is made to the proof of execution

— certificates of acknowledgment — of three deeds under which appellee derived title; these were a conveyance by Zaphna Lake and wife to Nathan C. Hills, dated March 22, 1843; recorded November 8, 1843.

A conveyance by Nathan C. Hills and wife to Isaac Loomis, dated July —, 1843; recorded November 8, 1843.

A conveyance by Isaac Loomis to John P. Emerson, dated February 2, 1846; recorded August 19, 1847.

These deeds had, when the abstract of title was delivered to appellant been on record in this county for forty-three years, they being each for the conveyance of eighty acres.

By the abstract it appears that by parties claiming title under these conveyances, eighteen deeds of the land now in question have been from time to time recorded, each being apparently upon a sale of the property. By the abstract it also appears that twelve mortgages made by parties claiming title under the deeds, the acknowledgments of which are now under consideration, have been placed upon record, eleven of which the abstract shows have been released; these mortgages appear to have been respectively made to secure the payment of large sums of money, and there is nothing tending to show that the records thereof do not represent actual and *bona fide* transactions.

Two subdivisions of portions of the property apparently conveyed by Lake, Hills and Loomis, in 1843 and 1846, have, as shown by the abstract, been placed upon record by parties claiming under such conveyances. One of these, recorded January 29, 1870, divided twenty acres into twelve blocks, and another recorded January 7, 1871, divided block 3 and the west half of block 4, of such subdivision, into lots. The recording of other instruments is shown by the abstract, from which it appears that Zaphna Lake was not living February 6, 1871, and that Isaac Loomis was an unmarried man at the time of the conveyances apparently made by him. The property seems by the abstract to have been sold in 1848 for the taxes of 1847, and in 1852 for the taxes of 1851. No tax deeds appear to have been issued, and the property does not appear to have been sold or forfeited for taxes at any other

time. Nor does there appear to be of record any title hostile to that derived under the conveyances, the validity of which is questioned.

For a period reaching beyond the forty years last past, such has been the law of this State that lands are annually sold or forfeited for taxes, yearly levied. Such taxes, if paid, are almost without exception paid by persons claiming an interest under some claim of title to the premises. When, therefore, it appears by an abstract of title that for more than forty years lands have not been sold or forfeited for taxes, save for those of two years, and it also appears that by such abstract that during this period there has been but one record title to such lands, and no title adverse to this is known to have ever been held or asserted, a fair presumption arises that the taxes upon such premises have during such term been paid by those claiming under such record title. Under these circumstances, were the three deeds, to the proof of which objection was made, entitled to be considered as ancient documents, of the execution of which no further proof is required? It is enough to entitle a document to be admitted in evidence to show that it bears upon its face marks of having been executed at least thirty years since, and that it comes from the custodians who would have possession of it if it were genuine. Such document proves itself. Wharton on Ev., Secs. 194-732-1359.

To entitle a deed to be admitted, some evidence in addition to proof of antiquity is required. Where possession has accompanied a deed, that of itself furnishes sufficient evidence of its authenticity to entitle it to be read without further proof, if it be more than thirty years old; possession is not, however, essential to admissibility; other things equivalent to it, or explanatory matter clearly indicating ownership, may justify its admission. Wharton on Ev., Sec. 199; Greenleaf on Ev., Sec. 144; Goodwin v. Jack, 62 Maine 416; Osborne v. Trines, 25 N. J. Law, 633-663; Harland v. Howard, 79 Ky. 373; Applegate v. Lexington, 117 U. S. 255; Caruthers v. Eldredge, 12 Gratt. 670.

In *Whitman v. Henneberry*, 73 Ill. 109, the Supreme Court of this State said :

"It is difficult to lay down a general rule as to the character of proof necessary to be given; but where the deed comes from the proper custody, and the facts and circumstances are proven to the court, from which it may reasonably be inferred that the deed has had an existence for over thirty years, such ought to be sufficient, where it is entirely free from any just ground of suspicion.

"Indorsements or memoranda upon a deed or ancient paper have been considered as circumstances indicating that they are genuine, where such indorsements or memoranda are of such a character as to show to a cautious mind that they would not be there had the paper been a forgery.

"In addition to this, if it be established that the deed has been of record for over thirty years, such ought to be a strong fact in its favor, although it may not have been recorded in the place required by law."

In *Haven v. Sea Shore Land Co.*, 20 Atlantic Rep. 497, there had, as in the present case, been no possession under the deed, but the court say that just such use had been made under it as would in the usual and ordinary course of such transactions have been made, had the persons dealing with it known it to be an honest paper.

In the present case these deeds have for many years been spread upon the public records of title to land; many transactions of great importance have apparently been had upon faith in the genuineness of these documents, so that, taking into consideration the great value the lands apparently conveyed by these instruments have had, it is almost inconceivable that if these deeds be forgeries, no one has, in the forty years during which they have been upon record, asserted a title hostile to those who have so long been claiming under them.

The deeds having for more than forty years been recorded in the proper office, numerous recorded transactions of large importance running through a period of many years having been had under them, the taxes for so many years having

Bucklen v. Hasterlik.

apparently been paid by those claiming thereunder, and no hostile title being shown to have ever existed or been asserted, we think that so far as these deeds are concerned, the abstract showed a title free from reasonable doubt.

This view of the case renders unnecessary any discussion of the sufficiency of the several certificates of acknowledgment attached to these instruments.

It is insisted that appellee, not having removed the incumbrance of \$7,000, which by the terms of the contract he was to do, and not having actually tendered a deed, can not complain of any default upon the part of the appellant. As to the removal of the incumbrance, the court, upon conflicting oral testimony heard in open court, found that appellee had the means, and was able, ready and willing, and offered to forthwith discharge such incumbrance, and to have the same released and canceled, but that appellant, by his attorney and agent, waived the release and cancellation of the same.

Such finding, being so had, is conclusive, unless it clearly appears to be against the weight of the evidence. *Metcalf v. Bradshaw*, 145 Ill. 124; *Coon v. Olsen*, 91 Ill. 273; *Patterson v. Scott*, 142 Ill. 138.

We regard the evidence as sustaining the finding.

Appellant has not at any time placed his refusal to carry out his contract upon the existence of this incumbrance, or the failure to prepare and tender a deed, nor did he ever intimate that if these things were done he would perform; he all the while knew that appellee was ready to do these things, and his attitude continually was, in effect, a statement that it would be useless for appellee to discharge the incumbrance or tender a deed.

We agree with appellant in his contention that his counsel could not waive the requirements of the contract, or make a new bargain for him (appellant). The contract required the furnishing of an abstract showing a title free from material defects, and a conveyance of a good title, that is, one free from reasonable doubts; that is, a title that is not reasonably or fairly questionable in the opinion of competent persons. *Close v. Stuyvesant*, 132 Ill. 607, 618, 620.

The furnishing of such an abstract, and the giving of such title, were things which the counsel of appellant had no power to waive; his failure to object to actual defects, or his opinion that material objections were untenable, would not conclude appellant; but as to the details by which the contract appellant had made was to be carried out, his counsel, employed to protect him and see that he obtained what he had bargained for, might make such arrangements as were consistent with the agreement, and in no way affected appellant's rights. Whether the incumbrance was removed one day or another, made no difference, so that it was in due season discharged before appellant was called upon to pay or further perform, and so that he in apt time received, as promised, a title free and clear from lien or incumbrance. *Hampton v. Specknagle*, 9 Sergt. & Rawle, 212; *Danzel v. Crawford*, 1 Par. Select Eq. Cases, 37; *Pickering v. Staples*, 5 Sergt. & Rawle, 106; *Sugden on Vendors*, 521, Ed. of 1873.

Where a vendee objects to the title, a tender of a deed which he declares he will not accept, is unnecessary. *Hampton v. Specknagle*, 9 Sergt. & Rawle, 212; *Tierman v. Bland et al.*, 15 Penn. St. 429; *Lyman v. Gedney*, 114 Ill. 388-408-410; *Hunter v. Daniel*, 4 Hare, 420-432; *Webster v. French*, 11 Ill. 254-276-278; *Shepler v. Green*, 31 Pac. Rep. 42.

No objection to the character of the abstract itself—that it was not such as was called for by the contract, was made by appellant; the objections were entirely to its contents, not at all that it was not such an one as appellant was bound to receive.

So, too, upon the trial in the court below, no objection to the introduction of the abstract in evidence was made; we therefore regard the objection now urged, that it was not shown to be admissible as evidence under the "Burnt Record Act," as coming too late. Such insistence can not be urged for the first time in an appellate court. Nothing appears to warrant an attack upon the abstract, as not such as appellee should have furnished; an objection of that kind, which, if valid, would be obvious upon a brief inspec-

Bucklen v. Hasterlik.

tion, should have been made within a short period after it was submitted for examination. *Carbine v. Pringle*, 90 Ill. 202, 204; *Miller v. Shaw*, 103 Ill. 277-285.

In *Chicago & A. R. Co. v. Keegan*, 31 N. E. 505, cited by appellant, it affirmatively appeared that the abstract did not fulfill the conditions of the "Burnt Record Act," and the trial court refused to admit it.

The objection to the description in the deed to Leslie Carter is not urged in this court.

It is true, as urged by appellant, that the rights of appellee were not enlarged by the filing by the International Bank of the bill of interpleader; neither were they by such proceedings diminished; the rights of the parties having come under equitable cognizance, they are to be adjudicated and adjudged in accordance with equitable principles; neither a penalty nor a forfeiture will, in such tribunal, be enforced, but compensation, which is the rule in equity, will be awarded for actual damage shown to have been incurred. No more than this has been awarded, and the decree of the Circuit Court is affirmed.

MR. PRESIDING JUSTICE GARY.

The result in this case is right, but it has been reached in an irregular manner, and the decree is, in form, one that the appellee is not entitled to; but it is less beneficial to him, and less prejudicial to the appellant than the case regularly presented would require.

When an interpleader is awarded, the original complainant is out of the case, and the defendants should make their claims against each other by such allegations and offers as if they were original litigants. *First Nat. Bk. v. West River R. R.*, 46 Vt. 633; 2 Dan. Chy. 1569.

Now, the only bill which Hasterlik could maintain against Bucklen is for specific performance, upon which, as relief, he might have obtained a decree that the money now in controversy be paid to him, and that Bucklen pay the residue within a time fixed, and that in default of payment, Bucklen be foreclosed, or at the election of Hasterlik, that the

land be sold, and that for any deficiency Hasterlik have a personal decree against Bucklen. *Vail v. Drexel*, 9 Ill. App. 439, and cases there cited.

The falling value of the land, and the present financial stringency, would make such a decree so much worse for Bucklen, that he has good reason to be satisfied with a decree that Hasterlik must be content with, as he procured it.

George H. Hess Company v. Dawson et al.

1. **BILL OF PARTICULARS—*Limitations by.***—A party is confined to the amount stated in his bill of particulars.

2. **BILL OF PARTICULARS—*Not a Part of the Record.***—A bill of particulars is not a part of the record, and should be shown by a bill of exceptions, if it is to be considered by a reviewing court.

Memorandum.—*Assumpsit.* In the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Declaration, common counts; pleas of general issue and tender; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the March term, 1898, and affirmed. Opinion filed May 29, 1898.

The opinion states the case.

MYER S. EMBICH, attorney for appellant.

D. T. DUNCOMBE, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We have examined the record of this case and regard the letters and inclosures therein, of July 22d, 23d and 24th, as constituting a contract that appellees would make up certain designated castings, from which appellant might from time to time order, paying on the 20th of each month for all goods ordered the previous month, and paying on the 20th of November for all the castings made. That the previous negotiations between the parties are immaterial and evidence of them was properly excluded. That under this

51 146
149s 138
51 146
57 335
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175s 374

George H. Hess Co. v. Dawson.

contract it was the duty of appellees to ship as ordered all of such castings, provided those ordered the previous month had been paid for on the 20th of the succeeding month. Thus appellees were bound to ship all castings ordered prior to August 21st. On that day if those ordered in July had not been paid for, they might refuse to give further credit, by filling further orders.

We think it appears by the letters of appellant, dated September 23d and September 29th, that it was, at each of said dates, derelict in the payment that should have been made at least as early as September 20th, and that it also appears by its letters, dated October 21st and November 3d, that it was on each of the last mentioned dates in default for payment that should have been made at least as early as October 20th.

It is not urged that the balance claimed to be due October 31st has ever been paid.

It thus appears that if appellant is entitled to recoup any damages it may have sustained by reason of a failure of appellees to supply goods as ordered, it can only be in respect to castings ordered prior to August 21st.

Appellant, however, insisted upon the trial in the court below, that appellees had failed to fill orders made, and that it, appellant, had been greatly damaged thereby, and it now insists that the Circuit Court erroneously refused to allow it to introduce evidence showing such failure and consequent damage.

The offers of the defendant were as follows :

Q. "You may state to the jury whether or not the plaintiffs in this case furnished the castings which they agreed to furnish as called for by you from month to month?"

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

Q. "You may state whether you had any conversation with the plaintiffs, or either of them, with regard to their not furnishing the castings as called for by you, and, if so, you may state what the conversation was?"

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

Q. "You may state whether, after the writing of the letter of July 22, 1890, and prior to November 20, 1890, you had any conversation with the plaintiffs in regard to their furnishing the castings called for, mentioned in this letter of July 24, 1890?"

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

Mr. Pope: "We offer to prove by the witness that subsequent to the writing of the letter of July 22, 1890, and prior to the 20th day of November, 1890, and also upon that day, repeated requests were made, and demands were made by the defendant and its officers, upon the plaintiffs, to furnish the material called for, and the castings called for in this letter of July 24, 1890, and that they refused and did not furnish them when called for."

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

Mr. Pope: "We offer now to show that from time to time and month to month, during this period, the defendant and its officers made demands upon the plaintiffs to furnish these castings, and that they refused and did not furnish them."

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

Mr. Pope: "We offer to prove by the same witness that during the same period, from month to month, we called upon them repeatedly for these castings, and they refused and did not furnish them."

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

Q. "You may state to the jury whether or not you, from month to month, called upon the defendant for the castings mentioned in this letter of July 24th, specifying each time the amount of castings in which they were deficient, and had not furnished, and asking them to send them forward at once."

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

Q. "You may state to the jury whether or not, in con-

sequence of any default, if any existed, by the plaintiffs, in not furnishing the castings as called for by the contract between the parties, you were put to any pecuniary loss; if so, what?"

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

Q. "You may explain in full to the jury the amount of loss sustained."

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

Mr. Pope: "We now offer to prove by the witness that in consequence of the default of the plaintiffs in not furnishing the castings as called for, we were unable to complete the furnaces entire, and that in consequence, we lost contracts—outstanding contracts we canceled because of our inability to furnish the furnaces, owing to the fact that we had not the castings which the plaintiffs had agreed to furnish."

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

Q. "You may state whether you had any outstanding contracts or orders which you were prevented from completing because of the failure of the plaintiffs to furnish these castings when you called for them?"

(Objected to by the plaintiffs; objection sustained; exception by the defendant.)

It will be observed that the appellant did not offer to show that there was a neglect to furnish castings at a time when it was not in default upon its payments, nor were any of the offers specific as to date or articles. See *Fairchild v. Case*, 24 Wend. 381.

Nevertheless, in view of the fact that the letters showing a default in the payments due September 20th and October 20th, were only introduced in evidence in rebuttal, it would seem to the writer of this opinion that appellant should have been permitted to show such specific failures to furnish goods as it could, leaving it to appellees to show the default of appellant as an excuse for complying with its order; that the rulings of the court indicated that its action was not based upon a want of definiteness in the offers to prove.

The majority of the court think otherwise, and it is to be said that it is inferable that there were no refusals prior to August 21st to fill orders, as appellant on the 17th of November paid in full for all that was due up to October 1st. It would seem that if, on August 21st, goods ordered prior thereto had been refused, and consequently, as contended, appellant was not bound, August 20th, to pay for goods ordered in July, that it would not, on the 17th of November, have paid in full for everything due up to October 1st.

As to any error in refusing to allow appellant to show failures to fill orders, because the evidence of the default of appellant had not then been presented, if the evidence of appellant's default that subsequently came in is to be regarded as conclusive, such error would be made immaterial by such subsequent evidence.

A bill of particulars having, it is insisted, been filed, it is urged that it was error to allow a verdict to be given and to render judgment for \$18 more than the amount of such bill.

A party is confined to the amount stated in his bill of particulars. *Morton v. McClure*, 22 Ill. 257; *Clement v. Brown*, 30 Ill. 43.

The declaration in this case contained the common counts—among others, one for account stated. No bill of particulars is necessary for such a count; and there was evidence warranting a verdict upon such count.

A bill of particulars is not a part of the record, and should be shown by a bill of exceptions, if it is to be considered by a reviewing court. *Eggleston v. Buck*, 24 Ill. 262; *Bogardus v. Trial*, 1 Scam. 63; *Harlow v. Boswell*, 15 Ill. 56; *Van Cott v. Sprague*, 5 Ill. App. 99; *Heacock v. Hosmer*, 109 Ill. 425; *Wheeler & Tappan Co. v. Dahms*, 50 Ill. App. 531.

No bill of particulars is shown by the bill of exceptions in this case, and we can not therefore consider it.

We find in this record nothing leading us to think, with counsel for appellant, that injustice is done by the judgment in this case, and it is affirmed.

Atchison, T. & S. F. R. R. Co. v. The Goetz & Brada Manufacturing Co.

1. **VARIANCE—Fleeding and Proof—Explanation of Terms Used.**—In an action against a railroad company to recover damages on freight, the plaintiff filed a declaration, stating a contract for the shipment of 161,690 pounds of angle iron, bar iron, tie iron, frames and plate iron punched, rod iron, rough iron, castings, bolts and boiler rivets, from Chicago to San Jose, California. Upon the trial the plaintiff introduced bills of lading, one being for the shipment of "gas reservoir material," another for the shipment of gas reservoir material, plate iron, punched angle bar, rods and plate iron, castings and rivets in kegs, and a third for gas reservoir material slate. These were objected to as not admissible under the declaration. *It was held*, that without explanation, they would not have been admissible, but that the plaintiff was entitled to show that the articles described in the declaration, were "gas reservoir material," and so known by manufacturers, shippers and carriers of freight.

2. **CONTRACTS—Construction.**—A court will admit evidence for the purpose of "placing itself in the shoes of the parties," to enable it to read the contract in the light and surroundings under which it was executed.

3. **PARTIES.**—The right of a person to sue in his own name, upon a simple unsealed contract made with him, although in form running to another party, is beyond dispute.

4. **RAILROAD COMPANIES—Right to Make Freight Tariffs—Agent's Construction.**—A railroad company has a right to make freight tariffs and to designate thereon articles as it sees fit, but it has no right to repudiate the construction its agent, for the purpose of procuring a shipment, has placed upon its tariff, in respect to such shipment.

5. **INTERSTATE COMMERCE — Falsely Described Goods.**—The term "falsely described" in the "Interstate Commerce Act," does not mean a mere incorrect description. The pains and penalties of the law are not intended for those who, in good faith, incorrectly describe or bill goods.

6. **PARTIES—Consignor and Consignee.**—Where there exists an express agreement with the consignor, he, as being the person with whom the contract is made, must be the plaintiff in an action against the carrier. The consignor is the person who actually consigns the goods, not necessarily the person in whose name a bill of lading is made.

7. **BILLS OF LADING—No Shipment, no Contract.**—A bill of lading, if there is no shipment, does not constitute a contract.

Memorandum.—*Assumpsit.* In the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Declaration to recover alleged over-charges exacted on freight; plea of non-assumpsit; trial by

VOL. 51.] A., T. & S. F. R. R. Co. v. Goetz & Brada Mfg. Co.

jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the March term, 1893, and affirmed. Opinion filed August 4, 1893.

STATEMENT OF THE CASE.

The Goetz & Brada Manufacturing Company in February, 1891, desired to ship to the San Francisco Brewers, at San Jose, California, a quantity of angle iron, bar iron, tie iron, frames and plate iron punched, rod iron, rough iron castings, bolts and boiler rivets, which were designed to be put together at San Jose, and used in the construction of floors in a malt house and certain steep tanks. The goods were being furnished by The Goetz & Brada Manufacturing Company to the brewing company, f. o. b. at San Jose, and the freight therefor was to be paid by Goetz & Brada. They desired to obtain the lowest freight possible, and for this purpose applied to various agents for rates. Mr. George H. Stanton, the contracting freight agent of the appellant, called upon Mr. Goetz, the president of the appellee company, for the purpose of making a freight rate on this material. There were two tariff sheets; one, called the "Western Classification," and the other, the "Special Commodity Tariff." The latter gave lower rates on certain articles than were given by the general western classification. The goods which appellee desired to ship were not specifically listed, either in the Special Commodity Tariff or in the Western Classification rate-book. Under these circumstances, it was the duty of the railroad company to receive the freight of appellee and make a rate of shipment thereon. Mr. Stanton, for that purpose, examined the Special Commodity Tariff rate-book, and decided upon a rate of \$1.15 per hundred pounds from Chicago to San Jose. He also instructed appellee to bill the goods as "gas-reservoir material," stating that they were the same kind of goods as gas-reservoir material, and could come under that head. Appellee used the term "gas reservoir material" in billing these goods, in accordance with the directions of Mr. Stanton. Mr. Stanton knew, however, that the goods were to be used in the construction of a malt-house plant, and were not to be used in the con-

A., T. & S. F. R. R. Co. v. Goetz & Brada Mfg. Co.

struction of a gas reservoir. The bills of lading were issued by appellant, describing the goods as gas reservoir material, and also as consisting of other material not included in the Special Commodity rate-book as gas reservoir material, and in the bill of lading guaranteed the freight rate of \$1.15 per hundred pounds to San Jose. Upon the arrival of the goods at San Jose, an inspector of the Transcontinental Association inspected the goods, rated them as machinery, and the railroad company charged and collected from the brewing company a rate of \$1.90 per hundred pounds. This was charged to appellee, paid by it, and suit brought to recover the overcharge.

APPELLANT'S BRIEF, EDGAR A. BANCROFT AND GEO. R. PECK.
ATTORNEYS.

Appellant contended for a reversal of the judgment because of a variance in the description of the shipment, citing *Randolph v. Onstott*, 58 Ill. 52; *Burnap v. Cook*, 32 Ill. 169; *Harms v. McCormick*, 132 Ill. 104; *Wise v. Twiss, Admr.*, 54 Ill. 301; *Trunkey v. Hedstrom*, 131 Ill. 205; and because of a variance in the name of the shipper, citing *Chitty on Pleading*, Vol. 1, p. 3; *Newcomb v. Clark*, 1 Denio 226.

A bill of lading is to be taken as the sole evidence of the final agreement of the parties by which their duties and liabilities must be regulated, and parol evidence is inadmissible to vary its terms or legal import. *Louisville & N. R. R. Co. v. Fulgham*, 91 Ala. 555; 8 So. Rep. 803; *Hinckley v. N. Y. C. & H. R. Co.*, 56 N. Y. 429; *Hutchinson on Carriers*, Sec. 126.

An agreed rate can not be proved by parol, even where no rate is named in the bill of lading. *Louisville, E. & St. L. R. Co. v. Wilson*, 119 Ind. 352.

Nor can agreed rebates be recovered against the expressed terms of the bill of lading. *Hopkins v. St. L. & S. F. R. Co.*, 29 Kan. 544.

Nor can the agreed route be proved by parol, even though no route is specified in the bill of lading. *Snow v. I. B. & W. Ry. Co.*, 109 Ind. 422; *The Sidonian*, 34 Fed. Rep. 805,

VOL. 51.] A., T. & S. F. R. R. Co. v. Goetz & Brada Mfg. Co.

806; *Ledne v. Ward*, L. R., 20 Q. B. Div. 475, 482; *The Delaware*, 14 Wall. 579, 600, 604; *White v. Ashton*, 51 N. Y. 280, 284.

It is a rule without exception that parol evidence is not admissible to vary the terms of a written contract. All oral negotiations respecting the terms and conditions upon which the goods are received and are to be carried, are conclusively presumed to be merged in the bill of lading. This must be taken as the final depository and sole evidence of the agreement between the parties. *Snow v. I. B. & W. R. Co.*, *supra*; *Long v. N. Y. C. R. Co.*, 50 N. Y. 76, 78; *Hill v. Syracuse R. Co.*, 73 N. Y. 351, 353; *O'Bryan v. Kinney*, 74 Mo. 125.

APPELLEE'S BRIEF, RUBENS & MOTT, ATTORNEYS.

The pleadings in this case were correct. The declaration sets forth that appellant agreed to carry for appellee certain material, describing the same according to the actual description of that material. The description, "gas reservoir material," as contained in the bill of lading, was open to explanation by parol evidence. The character, quality and quantity of goods described in a bill of lading, can always be shown to be different by parol evidence. *Bissel v. Price*, 16 Ill. 408; *Great Western Railroad Co. v. McDonald*, 18 Ill. 172; *Wallace v. Long*, 8 Brad. 504; *Illinois C. Railroad Co. v. Cobb*, 72 Ill. 148.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In this action, brought to recover alleged overcharges exacted on freight shipped by appellee, the plaintiff filed a declaration, stating a contract for, and the shipment of 161,690 pounds of angle iron, bar iron, tie iron, frames and plate iron punched, rod iron, rough iron, castings, bolts and boiler rivets, from Chicago to San Jose, California, at the rate of \$1.15 per hundred pounds, but that the defendants at San Jose, before it would deliver the same, exacted from the plaintiff the rate of \$1.90 per hundred pounds.

Upon the trial the plaintiff introduced bills of lading, one being for the shipment of "gas reservoir material," another for the shipment of gas reservoir material, plate iron, punched angle bars, rods and plate iron, castings and rivets in kegs, and a third for gas reservoir material plate; the rate specified therein being \$1.15 per hundred pounds. These were objected to as not admissible under the declaration.

Without explanation they would not have been admissible. The plaintiff was entitled to show that the articles described in the declaration were gas reservoir material, and so known by manufacturers, shippers, and carriers of freight. It was not necessary to describe the articles or state in the declaration the contract in the exact language used in making it. *Shore v. Wilson*, 9 Cl. & F. 555; *Wharton on Ev.*, Sec. 938, 961.

It seems that the articles described in the declaration and which were actually shipped, were such materials as are used in the construction of gas reservoirs, and would have been so classed had they been designed for such use, but being intended for a malt house, they were by the railroad agent at San Jose, classed as "machinery;" not that they were machinery, but that they, in his judgment, came under the rate known as the machinery class.

In consequence of the rulings of the trial court upon the objection made to the introduction of the bills of lading, the plaintiff, during the trial, obtained leave, and after verdict amended its declaration by alleging that "the said material was by plaintiff, at the advice and instructions of the defendant, billed as gas reservoir material, and the bills of lading described said material as gas reservoir material, and said material was accepted by said defendant company as gas reservoir material, with a full knowledge on the part of said defendant of the character of said material and the purpose for which the same was designed to be used."

Under this amendment the plaintiff proved that Mr. Stanton, as contracting agent of the Santa Fe Road, examined the material and said that it was virtually the same as that described in defendant's tariff sheet as gas reservoir mate-

VOL. 51.] A., T. & S. F. R. R. Co. v. Goetz & Brada Mfg. Co.

rial, and instructed plaintiff to bill it as gas reservoir material.

The defendant objected to the admission of this evidence as an attempt to vary the terms of a written contract, by a conversation had prior to it. We do not so regard the testimony. Its effect was not to vary the terms of a written contract, but merely to enable the court to understand it. It is a familiar rule, that a court will admit evidence for the purpose of placing itself in the shoes of the parties, to enable it to read the contract in the light and surroundings under which it was executed. Wharton on Evidence, Secs. 940, 961, 972; Gray v. Sharp, 1 Myl. & K. 602; Taylor on Ev., Sec. 1082; Myers v. Walker, 24 Ill. 133; Thorington v. Smith, 8 Wal. 1. Neither the average judge or juror would, without explanation, know what was meant by the expression, "gas reservoir material."

Whether the articles actually shipped were correctly described as such material, or whether by such description the parties meant to describe the articles actually shipped, were controverted questions as to which it was proper the court should hear evidence. Appellant's witness, Mr. Rich, offered as an expert, testified that for the articles shipped, if designed and adapted for the construction of a malt house, there was in the tariff, no classification at that time.

One of the bills of lading was in the name of the Plamondon Manufacturing Company; it is insisted that this bill was for this reason inadmissible. From the bill of lading describing the Plamondon Company as the shipper, it appeared that it was in fact given in pursuance of an arrangement made with appellee for the shipment of its goods, and, under it, the goods of appellee and some of the Plamondon Company were shipped, appellee paying the entire freight. Appellee called upon the Plamondon Company to refund the freight it paid for said company at \$1.90 per hundred.

This action was brought to recover the alleged overpayment on freight on appellee's property, not for any overpayment on property of the Plamondon Company. The right of appellee to sue in its own name, upon a simple

unsealed contract made with it, although in form running to another party, is beyond dispute. Chitty on Pleading, Vol. 1, p. 4, 9th Am. Ed., from 6th London Ed.; Dicey on Parties, p. 97, Rule 11.

There were introduced in evidence two tariff sheets, of which plaintiff had in its office, one. The rate for machinery, as published in these, was \$1.90 per hundred. Gas reservoir material—consisting of beams, columns, circular frames for top pulleys, weights, and chains for same, plate iron, punched—was rated at \$1.15 per hundred pounds. Angle and channel iron and steel beams, bar or rod iron, billets and blooms, boiler and plate iron, punched bolts and nuts, carriage or wagon, in boxes or kegs, machine, bridge and lag, and lag screw bolts or nuts, rivets in boxes or kegs, were rated at \$1.15 per hundred.

Upon one of these sheets was printed the following rules:

“14. Property Misrepresented.—When articles are shipped under a false name, in order to deceive the carrier or to avoid this tariff, agents at destination will collect charges according to a proper classification, and in case of loss or damage, consignees will be paid for the articles as called or shipped. Rates named in bills of lading on property misrepresented or wrongly described are illegal, and will not be protected.”

“16. Rates on Commodities.—Rates on commodities specified on pages 10 to 59, inclusive, are specific and must not be applied to analogous articles.”

“When rate for car-load lots is not named, the rate which is given will govern, regardless of quantity, and no two or more articles having a car-load rate shall be shipped in mixed car-loads at the car-load rate, unless so provided.”

Appellant contends that the freight on articles shipped is fixed by these tariffs, and that as the articles actually shipped were not designed for a gas reservoir, but for a malt house, they are to be treated as coming under the machinery class, and rated at \$1.90. These tariffs, one of which embraces fifty-nine pages, are susceptible of construction, and not in

VOL. 51.] A., T. & S. F. R. R. Co. v. Goetz & Brada Mfg. Co.

all cases, necessarily, easily understood. The agent of appellant when soliciting this consignment looked them over and construed them as fixing the rate on the material now under consideration at \$1.15, saying it was, virtually, gas reservoir material. Acting upon this construction appellee shipped by appellant's line and billed the goods as directed by its agent.

Appellant now repudiates the act of its agent, and says that the goods were incorrectly billed. In this controversy it seems to us that at the least, appellee was entitled to show the circumstances under which the goods were shipped and billed, and to ask the jury to say what, under the circumstances, for the purposes of this contract of shipment, the goods are to be considered to be.

Appellant has a right to make freight tariffs, and to thereon designate articles as it sees fit, but the right to repudiate the construction its agent, for the purpose of procuring a shipment, has placed upon its tariff, is, in respect to such shipment, quite another thing.

The railroad agent at San Jose who examined the articles now under consideration, says that knowing that the Malt House Company contemplated erecting an electric plant, he suspected fraud, and made a thorough examination of the shipment, and that it consisted of the machinery and fittings for a malt house plant; what he considered to be machinery is shown by his further answer that he should rate as machinery angle iron, frames, pieces of plate iron, iron doors, bundles of bar iron, bundles of galvanized iron, bar iron frames, bundles of punched iron, wrought iron bars, iron castings, plates of boiler iron, bolts, bundles of iron castings, boiler iron plates, bars of angle iron, bundles of sheet iron, bundles of bolts, a tool box, bars of flat iron, bar iron, iron frames, if prepared to be fastened together and used in the construction of a malt house, and fitted ready to be put together, after being put together comprising a part of a malt house plant.

Appellant contends that appellee, in violation of the interstate commerce act, falsely described its property for the

purpose of getting a low rate; this is a grave charge, and if true, ought to entitle appellant to a reversal of the judgment in this case; appellant also says that its "unscrupulous and unfaithful agent, with whom appellee connived" confessedly had nothing to do with receiving the goods or making the contract. We do not understand the record of this cause as justifying these charges.

The evidence upon this point is that Mr. Goetz, the president of the appellee company, had conversation with soliciting agents of different freight roads, among others, with a Mr. Stanton, representing the freight department of appellant; that Mr. Stanton gave his card as contracting freight agent of appellant, and the conversation before alluded to was had with this Mr. Stanton when the goods were ready to ship, a day or two before the bills of lading were made.

The goods were not delivered to Stanton, nor were the bills of lading received from him, nor does his name appear thereon. A written description of the goods was sent to appellant's local freight agent at Chicago, which description was "two car loads gas reservoir material, consisting of plate iron, punched, angle bars, rods and plate iron castings and rivets in kegs."

There is nothing to show any "connivance" of appellee with an unfaithful agent of appellant. Nor is there anything to show that Mr. Stanton, appellant's agent, was unfaithful.

He was not called as a witness, and at the utmost it can only be said by appellant that he was mistaken.

Information given in good faith by appellee of the character of the goods to a contracting freight agent of appellant was sufficient. There is nothing tending to show bad faith upon the part of appellee, and we therefore do not perceive wherein the describing of these goods as gas reservoir material, etc., was a violation of the interstate commerce act.

Appellant's agents seem to place their statements that they were not thus correctly described, largely upon the

fact that they were not intended for such use, and counsel for appellant, in effect, urge that appellant may discriminate in respect to its freight charges in favor of a particular use to which property, carried, is to be applied; that the trouble, expense, labor, responsibility and in all respects the carriage being the same, more may be exacted for the transportation of the same goods when designed for a malt house than when intended for a gas reservoir; as to the bearing of the interstate commerce act upon such discrimination, we are not called upon to express any opinion.

Appellant urges that the jury was improperly instructed; but, after summarizing the instructions given at the instance of the plaintiff, say that "For the defendant the court with marked impartiality gave instructions nearly if not the exact opposite of these; but refused, however, to instruct according to the plain facts of the case, that the plaintiff could not recover on a contract to carry gas reservoir material by proving a refusal to carry portions of a malt house plant." As we have already indicated, we do not think that under the evidence this case turns upon whether the material carried was designed for a gas reservoir or for a malt house. No complaint is made of the amount of the verdict. We are of opinion that the jury, under the evidence, having arrived at the conclusion which the law points out, whether they were in all respects properly instructed is comparatively unimportant, and that the judgment of the Superior Court should be affirmed.

OPINION ON REHEARING.

It is not, as counsel for appellant in a petition for rehearing seem to think, the opinion of this court that evidence is admissible to show what the secret intention or meaning of parties to a contract was. But the court will, in construing the contract, place itself in the shoes of the parties, in order that it may read the contract from their standpoint; and it will hear evidence as to the significance of technical or local expressions. So doing the court below permitted the following testimony to be given:

“Q. How did you come to bill this as gas reservoir material for shipment?

(Objection; overruled; exception.)

A. We were so instructed by Mr. Stanton, contracting agent of the Santa Fe road, after going through all that material; it was right on the place to be shipped, and he said under their tariff sheet it is the only head it can come under, because it is the same material described in their own tariff sheet as gas reservoir material, and could not find any other head in their tariff sheet, so he instructed us to bill it as gas reservoir material, because there was no other material included in that lot that would not be classified as gas reservoir material, although it was not used as a gas reservoir, no more than a boiler is different from a water-tank; although a water-tank is not a boiler, the material is the same.”

This testimony was undisputed. It thus appears that appellee wrote the words “gas reservoir material,” under direction of the agent of the appellant, as proper words to describe the articles actually shipped.

To arrive at the intent, not of one, but of all the contracting parties, is always the object of the court; not a secret intent of one, but what each knew was meant and intended that the words used should express.

It is the case that the witnesses who testified that the articles shipped came under the general description of gas reservoir material and were substantially the same as gas reservoir material, did not specifically testify that the articles were so known in any business; but they were business men accustomed to deal in such material, and their competency to speak upon this matter does not seem to have been questioned. The real question in this regard was not whether such expression correctly described the shipment, but what did each of the parties intend and mean by such expression. About this there was no doubt and no dispute.

Appellant does not deny having made the alleged contract of shipment, but it insists that it is not bound thereby because it alleges that the goods were “falsely described.”

VOL. 51.] A., T. & S. F. R. R. Co. v. Goetz & Brada Mfg. Co.

The goods were not "falsely described." That expression in the bills of lading and in the "Interstate Commerce Act" does not mean a merely incorrect description. The pains and penalties of the law are not intended for those who in good faith incorrectly describe or bill goods. In this case in the utmost good faith appellee billed these articles as "gas reservoir material." Such billing was made in pursuance of instructions given them by appellant; when the shipment was at an end another agent of appellant decided that the consignment was incorrectly, or, as appellant contends, falsely billed; this was a thing which, as against appellee, he had no power to do.

Counsel for appellant urge that the record does not show that appellee consulted other railroad companies concerning the shipment. The original brief of the same counsel contains the following: "When the goods were ready for shipment, Mr. Goetz, after consultations with various freight men, decided to send them by the appellant line." The record shows that Mr. Goetz testified that prior to shipping the goods, he had conversations with several soliciting agents of different roads, among others with Mr. Stanton, the agent of appellant.

If, as contended by appellant, the contract it made is void, then the rate would be such as should under the tariff have been made.

We see no warrant for rating the articles shipped as machinery; while we do find that most, if not all of such articles, if described separately as steel and iron angle and channel beams, columns and girders, bar or rod iron, boiler iron, plate, punched, bolts and rivets, would, under the transcontinental tariff, have been rated at \$1.15, the amount appellant and appellee agreed to.

Counsel again urge that only the consignor named in a bill of lading can bring suit thereon; and cite from Dicey on Parties, the rule that "When there exists an express agreement with the consignor, he, as being the person with whom the contract is made, must be the plaintiff in an action against the carrier."

Carroll-Porter Co. v. Wheeling Co.

The rule is correctly stated. The consignor is the person who actually consigns the goods; not necessarily the person in whose name a bill of lading is made.

A bill of lading, if there be no shipment, does not constitute a contract; a bill of lading without consideration therefor, is a mere piece of paper; there must, to constitute a contract, be a consideration as well as parties. The whole subject is admirably treated in Dicey on Parties, at page 97, following rule 11.

The application for a rehearing will be denied.

Carroll-Porter Boiler & Tank Co. v. Wheeling Corrugating Co.

1. DRAFTS—*What is an Acceptance.*—Appellee drew a draft upon appellant. Appellant did not accept it formally, but stated, "We have not, to our knowledge, accepted the order as yet, but we will protect your interests when the payments are made to us by the Furnace Company, as we will not pay anything to Messrs. Veach, Dickinson & Mendahl." The question being, was the acceptance of the draft sufficient to bind the appellant, *it was held* not sufficient.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1893, and reversed. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

N. M. JONES, attorney for appellant.

APPELLER'S BRIEF, DEFREES, BRACE & RITTER, ATTORNEYS.

Unless otherwise required by statute, no particular form of words is necessary to make a valid acceptance, but any words showing a clear intent to accept the bill will be sufficient. An acceptance may even be implied from the conduct of the drawee or from other circumstances. 2 Randolph on Com. Paper, Sec. 599.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action commenced by attachment to recover the amount of a draft drawn upon the appellant in favor of the appellee by the firm of Veach, Dickinson & Mendahl.

The circumstances under which the draft came to be drawn were as follows: The appellant had a contract with the Iroquois Furnace Company for building a roof for a casting house at Chicago, and entered into a sub-contract with Veach, Dickinson & Mendahl to do the work. The last mentioned firm purchased from the appellee material for that purpose and issued its draft on the appellant in payment for such material.

This suit was brought, on what appellee contends to be an acceptance of the draft; the appellant, on the other hand, contending that there was no acceptance.

On March 6, 1891, the appellee wrote the appellant advising it of the draft, inclosing a copy, and inquiring whether it would be satisfactory to draw at sight for the amount, attaching the original draft.

The reply is dated March 7th, and says: "Owing to the delay in getting the building on the ground, for which the corrugated iron was intended, we have as yet been unable to get any payment on same, and therefore could not accept your draft on us. We have not, to our knowledge, accepted the order as yet, but we will protect your interests when the payments are made to us by the Furnace Company, as we will not pay anything to Messrs. Veach, Dickinson & Mendahl."

The draft inclosed is as follows:

"NEWARK, O., March 4, 1891.

To the Carroll-Porter Boiler and Tank Co., Penn avenue,
Pittsburg, Pa.:

GENTLEMEN: Please pay to order of the Wheeling Corrugating Company, Wheeling, West Va., the sum of six hundred and eighty-three (683) dollars, and charge same to our account for work furnished you for South Chicago, Illinois.

VEACH, DICKINSON & MENDAHL."

Carroll-Porter Co. v. Wheeling Co.

May 3, 1891, appellant received from the Iroquois Company payment in full.

Upon the hearing it was not made to appear that at any time appellant was indebted to Veach, Dickinson & Mendahl, the attachment debtors, or had ever had in its hands any property or assets belonging to said last mentioned firm.

The secretary of the appellant company testified as follows: "We are not indebted to Veach, Dickinson & Mendahl in any sum. They are indebted to us. We are not indebted to the Wheeling Corrugating Company, the plaintiffs in this suit, and never had any business or dealing with them. The Carroll-Porter Company entered into an agreement with the Iroquois Furnace Company, of Chicago, for furnace plant; then we sub-let part of the work to Veach, Dickinson & Mendahl. Veach, Dickinson & Mendahl failed to complete the work, as per contract, and we were compelled to finish the work at a loss to our firm. Veach, Dickinson & Mendahl agreed to do the work for \$3,357, and as they failed to complete it, we were compelled to complete it at an expense of about \$3,900. This leaves Veach, Dickinson & Mendahl in our debt about \$500, as we hold them for the difference. We are not indebted to them or the plaintiffs in any sum whatever."

This evidence was not contradicted. After the reply sent to the letter of March 6, 1891, other letters passed between appellant and appellee, but none that we deem as affecting the relation of the parties.

As is stated by counsel for appellee, "the whole controversy turns upon the question of whether or not there was an acceptance of the draft sufficient to bind the appellant."

The language upon which such acceptance is claimed is as follows:

"We have not to our knowledge accepted the order as yet, but will protect your interests when the payments are made to us by the Furnace Company, as we will not pay anything to Messrs. Veach, Dickinson & Mendahl."

Two promises are here, it is said, made:

First, that the interests of appellee shall be protected.

Second, that appellants will not pay anything to Messrs. Veach, Dickinson & Mendahl.

As to the first, the only interests of appellee with which appellants had, or it was expected could have, any connection and would protect, was that appellant might at some time have in its hands property belonging to Veach, Dickinson & Mendahl or be owing something to them. If this condition occurred, it would be for the interest of appellee that appellant, instead of turning such property over or paying such indebtedness to Veach, Dickinson & Mendahl, should hold the same for the benefit of appellee.

Appellant never did have any property belonging to Veach, Dickinson & Mendahl, and never owed or paid them anything. There was, therefore, no failure of either of the promises said to have been made by appellant.

We regard this undertaking of appellant as merely a promise that they would not pay anything to Veach, Dickinson & Mendahl; the second clause qualifies the first, and clearly shows in what way it promised to protect the interests of appellee.

There was in no respect an absolute acceptance by appellant of the draft made by appellee.

The utmost that can be claimed is, that there was an acceptance to the extent and upon the condition that appellant should become indebted to Veach, Dickinson & Mendahl. This condition never happened.

The judgment of the Circuit Court is therefore reversed, and the case having been tried without a jury, we will here enter a judgment on a finding of fact.

51 166
51 446
150s 229
51 166
58 450

The Attorney-General of the State of Illinois v. The Newberry Library.

1. TRUSTS—*Construction of Instruments Creating.*—It is one of the well recognized functions of a court of equity, whenever there is any *bona fide* doubt as to the true meaning of an instrument creating a trust, at the suit of the trustee brought for that purpose, to give a judicial con

Attorney-General v. Newberry Library.

struction to the instrument and direction to the trustee as to his powers and duties thereunder.

2. TRUSTS—*Public Interests—Attorney-General a Proper Party.*—Where the public is interested in the execution of a trust, the attorney-general is the proper party, either plaintiff or defendant, as the representative of the public.

5. ESTATES—*Limitations in Wills, upon Leases, etc., do not Continue after the Estate has Passed from the Trustees.*—The limitations in a will as to the length of time for which leases of real property are to be made and the restrictions upon the character of investments to be made by the trustees of the will, do not continue after the property has passed out of the hands and control of such trustees.

Memorandum.—Bill to construe a will. Error to the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

STATEMENT OF THE CASE.

This suit was brought in the Circuit Court of Cook County by the Newberry Library, a corporation organized under the laws of the State of Illinois, against the Attorney-General of the State of Illinois, to obtain the instruction and direction of a court of chancery as to whether certain limitations on the power of the trustees of the estate of Walter L. Newberry, deceased, limiting the powers of said trustees during the administration and management of the said trust, continue to exist as limitations after the distribution of said estate, and what is the effect upon the provisions of said will, imposing such limitations, of section 4 of the act of the legislature of the State of Illinois, entitled "An act to encourage and promote the establishment of free public libraries in cities, villages and towns of this State, approved June 17, 1891, in force July 1, 1891."

Walter L. Newberry, of the city of Chicago, county of Cook and State of Illinois, died in November, 1868, leaving a last will and testament, which was subsequently admitted to probate in the County Court of Cook County, Illinois, and by the terms of which will Mark Skinner and Eliphalet W. Blatchford were appointed as trustees to control and manage said estate left to said trustees, until the final distribution thereof, as directed by said will.

Among the powers given to said trustees while managing and administering said trust, was the power to make leases of the real estate belonging to said trust, for terms not exceeding twenty years. The clause limiting such power is as follows:

"If, in the opinion of my said trustees, it would be for the best interest of my estate, in order to secure valuable improvements to be made upon any unimproved lot or land belonging to my estate, to lease said lot or lands for a longer period than five years, then my will is and I hereby direct, that my said trustees lease and demise the same for any period longer than five years, but not exceeding the period of twenty years, as they may see fit."

Another limitation on the power of the trustees, is the limitation directing what investments shall be made by the said trustees, and is as follows:

"In making investment of money that may from time to time come into the hands of my trustees, etc., it is my wish, and I direct that my said trustees invest the same, either in the securities of the United States of America, or of the State of Illinois, or of the county of Cook, or of the city of Chicago, or in loans secured by bond or mortgage on good, improved, unincumbered real estate in the city of Chicago, worth in their judgment at least twice the amount of the money loaned and secured thereon; the land to be worth without improvement, at least as much as the amount loaned upon such improved property; it being my intention that my said trustees may invest in any or all of said securities as they may see fit, but in none other; and in purchasing bonds of the United States, State of Illinois, county of Cook or city of Chicago, to pay therefor the market price at the time and times of making such purchase."

By the terms and provisions of said will, the time for final distribution and division of the estate of said decedent was postponed until the death of the widow and two daughters of said decedent, and the provisions of said will relative to the founding of a free public library were contingent upon the death of the two daughters of the said de-

cedent, without lawful issue. Until such final distribution and division of said estate, the said trustees were directed to hold, manage, control and administer the said estate, subject to the directions and limitations contained in said will, for the administration of said trust; and upon such final distribution the trustees were directed to convey the said estate to the said devisees and beneficiaries who should be entitled thereto at the time of such distribution.

Subsequently the two daughters of said decedent died without leaving issue; thereafter the widow of said decedent also died, and the time arrived for the distribution of the estate of said decedent, and such distribution was made as directed in said will. At the time of such distribution Eliphalet W. Blatchford was the sole surviving and acting trustee under said will of Walter L. Newberry, deceased, and as such trustee he held the title to a large number of lots, pieces and parcels of land, located in the city of Chicago, county of Cook, and State of Illinois, and a large amount of personal property, and upon such distribution one-half part of said estate was conveyed to the devisees entitled thereto by the terms of said will, and one-half part thereof was set apart and applied by the said Eliphalet W. Blatchford, as sole surviving trustee under the will of Walter L. Newberry, deceased, toward the purposes designated in said will, namely, to the founding of a free public library in the north division of the city of Chicago, county of Cook and State of Illinois.

On June 17, 1891, an act was passed by the legislature of the State of Illinois, entitled "An act to encourage and promote the establishment of free public libraries in cities, villages and towns of this State, approved June 17, 1891, in force July 1, 1891."

For the purpose of carrying out the object aforesaid, as designated in said will, namely, the founding of a free public library in the north division of the city of Chicago, County of Cook and State of Illinois, the said Eliphalet W. Blatchford, sole surviving trustee under the said will of Walter L. Newberry, deceased, caused the Newberry

Library to be organized under the act aforesaid, on April 13, 1892, and conveyed to the said corporation, the Newberry Library, all the real estate and personal property before that time by him set apart for the purpose aforesaid, and the same was accepted by said corporation.

This was done under the provisions of the will as to the founding of a free public library, which are as follows:

"The other share of my estate shall be applied by my said trustees, as soon as the same can consistently be done, to the founding of a free public library, to be located in that portion of the city of Chicago now known as 'the North Division.' And I do hereby authorize and empower my said trustees to establish such library, on such foundation, under such rules and regulations for the government thereof, appropriate such portion of the property set apart for such library, to the erection of proper buildings and furnishing the same, and such portion to the purchase and procurement of books, maps, charts and all such other articles and things as they may deem proper and appropriate for a library, and such other portion to constitute a permanent fund, the income of which shall be applicable to the purpose of extending and increasing such library; hereby fully empowering my said trustees to take such action in regard to such library as they may judge fit and best, having in view the growth, preservation, permanence and general usefulness of such library."

Section four of the said act of the legislature of the State of Illinois, is as follows:

"Organizations formed under this act shall be bodies corporate and politic, to be known under the names stated in the respective certificates or articles of incorporation, and by such corporate names they shall have and possess the ordinary rights and incidents of corporations and shall be capable of taking, holding and disposing of real and personal estate for all purposes of their organization. The provisions of any will, deed, or other instrument by which endowment is given to said library and accepted by said trustees, managers or directors, shall, as to such endow-

ment, be a part of the organic and fundamental law of such corporation," etc.

By reason of the said section of the statute and the provisions of the said will and codicil, the power of the Newberry Library to give leases of its real estate for terms in excess of twenty years has been questioned, and although it has had frequent applications for such leases, it is embarrassed by such question and can not negotiate therefor, and can not obtain such large rentals as it might obtain were it not for such question as to its powers; and it has been compelled to decline to negotiate with parties desiring such leases who would be willing to pay large rentals, were such doubt as to its power removed.

The said corporation has also from time to time had opportunity to make desirable investments other than those set forth in said will and is unable to take advantage of the same and negotiate therefor by reason of doubt as to its powers as set forth in said will, and thereby it has lost and will continue to lose large profits and gains to the charitable use of the charity it represents.

The bill, therefore, asked the instructions and directions of the court in the premises, that it might be adjudged that such limitations on the powers of the trustees to make leases to periods of twenty years, and the limitations on the powers of the trustees to make investments as set forth in said will, were temporary and incidental only, and were only designed to control the trustees under said will during the continuance and management of said trust, and ceased to exist on the final distribution of said estate; and that when the said property was conveyed to the Newberry Library, the Newberry Library received and took the same free of and discharged from the said limitations, and that such limitations being only temporary, did not become a part of the organic and fundamental law of the Newberry Library.

The attorney-general of the State of Illinois being duly served with a copy of said bill entered his appearance and filed a general demurrer. Subsequently the demurrer was overruled and a decree was entered whereby the court found the complainant entitled to relief, and declared that accord-

ing to a true construction of the will of Walter L. Newberry, deceased, the limitations therein, whereby the trustees were only authorized to make leases for periods not exceeding twenty years, and whereby the trustees were limited to the investments specified in said will, were confined to the period of the administration and management of the trust confided to said trustees, and continued only up to the final distribution and division of the estate of said decedent and no longer; and that upon the organization of the Newberry Library under the act of legislature entitled "An act to encourage and promote the establishment of free public libraries in cities, villages and towns, approved June 17, 1891, and in force July 1, 1891," and the conveyance to the said corporation by Eliphalet W. Blatchford, surviving trustee under the said will, of the one-half part of the property applied and set apart for the founding of a free public library, the said provisions of the said will limiting the power of the trustees under the said will to make leases of real estate of said decedent for periods of twenty years, and the limitation on the power of said trustees to make investments as specified in said will only, ceased to exist, and did not become parts of the organic and fundamental law of the said corporation. The court, therefore, ordered, adjudged and decreed that the said complainant holds the estate and property conveyed and transferred to it by Eliphalet W. Blatchford, surviving trustee, under the will of Walter L. Newberry, deceased, and the proceeds thereof, free from the restrictions and limitations contained in said will and codicil relative to leases and investments, and that said complainant has the same powers over said estate and the proceeds thereof, that it would have if the restrictions in said will and codicil in regard to leases and investments, did not exist. The attorney-general, plaintiff in error, brings this writ of error to this court.

M. T. MOLONEY, Attorney-General, T. J. SCOFIELD and MARTIN L. NEWELL, for plaintiff in error.

DAVID FALES, attorney for the defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is one of the well recognized functions of courts of equity, wherever there is any *bona fide* doubt as to the true meaning of an instrument creating a trust, to, at the suit of the trustees brought for that purpose, give a judicial construction to the instrument, and direction to the trustee as to his powers and duties thereunder. Attorney-General v. Haberdasher's Co., 1 Vesey, Jr., 295; In re Shaw's Trusts, L. R. 12 Eq. 124; Perry on Trusts, Sec. 746; Pomeroy's Eq. Juris., Secs. 1064, 1156; Bailey v. Briggs, 56 N. Y. 407.

Where the public is interested in the execution of a trust, the attorney-general is the proper party, either plaintiff or defendant, as the representative of the public. Barbour v. Parties, 468-661; Tudor's Law of Charitable Uses, 161; Perry on Trusts, Sec. 773; Hunt v. The Chicago and Dummy Railroad Co., 20 Ill. App. 282-290; Jackson v. Phillips, 14 Allen, 539; Fund Association v. Beckman, 21 Barb. 565.

The principal question presented in this case is whether the limitation as to the length of time for which leases of real property and the restrictions upon the character of investments to be made by the trustees of the will, continue after the property has passed out of the hands and control of such trustees.

By the will the estate was divided, substantially, into two principal shares or classes. One of these was after the happening of certain events to be distributed to various individuals, relatives of the testator; the other share of the estate was to be applied by his trustees to the founding of a free public library.

The testator foresaw that, as happened, a considerable number of years might elapse before his trustees could distribute the estate in accordance with the provisions of the will, and he also realized that the arrival of the period of distribution was uncertain and might come within the term of twenty years.

In order, therefore, to provide that the title to real estate when divided at the period of distribution, should not be

incumbered by too long leases, he, while giving in many respects the most ample powers of distribution to his trustees, restricted them, in the matter of leasing, to the making of leases for a period not exceeding twenty years. And foreseeing the desirability that the personal part of the estate should, at the arrival of the time for distribution, consist of readily convertible assets, having a well recognized market value, he provided that the trustees of the will should make investments of only certain kinds.

The numerous individuals who were the objects of the testator's bounty, it is manifest, take at the distribution of the estate an absolute ownership, free of any control of the trustees, but take the distributed estate in the condition in which the trustees, in accordance with the terms of the will, have placed it.

So, too, the share to be applied for the founding of a free public library, when so applied, was to belong absolutely to such library, freed from all control of the trustees appointed to execute the will.

The trustees under the will had two things to do, viz.: To manage and to distribute the estate; when the appointed time for distribution came, and the estate was distributed, their functions as trustees of the will ended.

In accordance with the will, they have given over the share to be used for the founding of a free public library to a corporation created for the purpose of receiving such share and administering it in accordance with the testator's direction in that regard. There is in the will no provision as to how any of the individuals who took under this will were to manage their portions, and there is no direction as to the manner in which the property devoted to the founding of a free public library is to be managed; the setting apart of a portion as a permanent fund to provide an income for the purpose of extending and increasing the library is mentioned, but no directions as to its amount or management are given.

The provisions of the will limiting leases of lands to twenty years and the restrictions as to the character of investments, are applicable to the entire estate; they affect

Schwartz v. Southerland.

the shares of individuals as much as the share devoted to library purposes. Such provisions have nothing to do with any portion of the estate after its distribution by the trustees of the will.

Section four of the act under which appellee became an incorporated entity, does not add to the duties of the trustees of this will; it does make the clause of said will providing for the founding of a free public library a part of the law of appellee's being, and appellee, under the provisions of said section four, can not transform the library into a book repository, not free, or remove it from the north division of the city of Chicago. It is bound to effectuate the testator's desires in this regard; it is not bound in the management of its income fund to pay heed to the restrictions put upon the trustees from whom, in the due course of administration, it received the fund.

The decree of the Circuit Court entered upon the overruling the demurrer of the attorney-general to the bill is affirmed.

Schwartz et al., Administrators, etc. v. Southerland.

51	175
69	678
51	175
108	97

1. *PLEAS—Imposing Terms on Withdrawal.*—Where a defendant asks leave to withdraw a plea, it is error for the court in granting it to impose conditions.

2. *JOINT LIABILITY—Plea Denying.*—The effect of Sec. 86, Chap. 110 R. S., entitled Practice, providing that in actions upon contracts expressed or implied against two or more defendants, as partners or joint obligors or payors, proof of the joint liability or partnership of the defendants, or their christian or surnames, shall not, in the first instance, be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or unless the defendant shall file a plea in bar denying the partnership or joint liability, or the execution of the instrument sued upon, verified by affidavit, is to relieve the plaintiff from proving joint liability if the defendant fails to file a proper plea of denial and fails to show that he is not jointly liable. It is in "the first instance" that the plaintiff is not required to make proof of joint liability.

Memorandum.—Assumpsit. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 13, 1894. Opinion on rehearing filed March 14, 1894.

The statement of facts is contained in the opinion of the court.

JOHN S. COOK and HENRY S. MONROE, attorneys for appellants; T. A. MORAN, of counsel.

JOHN M. HAMILTON, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee, in 1883, began this suit against four persons, of whom Charles Schwartz was one; the suit was afterward dismissed as to one of the defendants, another died, and the case proceeded to trial against Schwartz and Charles K. Willard, with the result of a judgment for over \$7,000 against Schwartz & Willard.

The defendants were brokers in Chicago, engaged in buying and selling stocks upon the market in New York. Appellee dealt with them as such.

Upon the trial, Schwartz offered certain depositions taken in New York; these were excluded by the court. In so far as these depositions showed the entries and accounts upon books kept in New York, we do not think they were admissible; they were *res inter alios acta*. *Boyd v. Yerkes*, 25 Ill. App. 527.

Schwartz had, however, a right to show in what manner the orders of appellee had been obeyed, and for this purpose could show sales and purchases, in compliance with appellee's directions, by any one who knew of the same. If the persons who executed these orders kept any memorandum of the same, or any was made at the time under their direction and supervision, they could refresh their memory therefrom.

Schwartz was entitled to show the dissolution of the firm with which appellee began his dealings, and his knowledge

Schwartz v. Southerland.

of such dissolution, and also other changes in the firm, of which appellee had notice.

It was contended by Schwartz that a settlement or compromise was had with appellee of his claims against the defendants, his brokers; and that, by the terms of this settlement, 500 shares of Wabash preferred stock were purchased by defendants for account of appellee, and were to be carried for him without margins. Appellee contended that this stock was sold without his consent. Schwartz was entitled to show that it finally became worthless, as well as its value from time to time subsequent to the sale.

The depositions should not have been entirely rejected.

Schwartz asked leave to withdraw a plea of set-off; this the court permitted him to do under certain conditions. The imposing of these conditions is complained of as error.

The conditions should not have been imposed and should be removed. *Ayres v. Kelley*, 11 Ill. 17; *Winslow v. Newlan*, 45 Ill. 145; *Shabad v. Hanchett*, 40 Ill. App. 545; *Quick v. Lemon*, 105 Ill. 578; *Theobald v. Colby*, 35 Me. 179; *Loren v. Hanks*, 3 McCord (S. Car.) 328.

Notwithstanding there was, under our statute, no proper plea by Schwartz denying joint liability, he should have been permitted to introduce evidence showing that he was not jointly liable. The effect of the statute is only to relieve the plaintiff from proving the joint liability, if the defendant fails to file a proper plea of denial and fails to show that he is not jointly liable. It is in "the first instance" that the plaintiff is not required to make proof of joint liability. *Bensley v. Brockway*, 27 Ill. App. 410; *Supreme Lodge of United Workmen et al. v. Zuhlke*, 129 Ill. 298.

Instructions four and five for plaintiff should not have been given.

We do not deem it necessary to comment further upon the trial in the court below.

As to whether there was a compromise and settlement in May, 1883, and as to whether the agreement, if any, then made, has been carried out, or the benefit thereof received

by appellee, by availing himself in whole or in part of the same, and as to whether the agreement then made was broken by appellant, and if so, the effect thereof, and the damage that appellee has suffered by reason of such breach, if any there was, are all, under the plea of the general issue, questions of fact to be submitted, under proper instructions, to a jury.

The judgment of the Superior Court is reversed and the cause remanded.

OPINION ON REHEARING, PER CURIAM.

On petition for rehearing the counsel of the appellee—citing two cases, *Fisher v. Greene*, 95 Ill. 97, and *Fielding v. Fitzgerald*, 130 Ill. 441, to the effect that a party may not, on the eve of, or after a trial, present new issues—asserts, with emphasis, that “either those decisions are wrong, or this court is wrong.” This assertion is made in forgetfulness of the familiar rule that the matter contained in one plea is utterly without effect, not to be looked at, upon an issue of law or fact arising upon another part of the pleadings, which are not in continuation of the line of pleading in which the first plea is.

There has been, so far as we are advised, but one occasion in this State (*Farnam v. Childs*, 66 Ill. 544) to refer to that rule, but it is often repeated elsewhere. The authorities down to thirty years ago are pretty well collected in note to *Jackson v. Stetson*, 15 Mass. 48.

The plea of set-off by the defendants below did not change their right to make, under the general issue, any proof that would have been admissible if no set-off had been pleaded.

As to whether any portion of the depositions excluded by the court should be admitted upon another trial must be determined by the issues then made and the course the trial then takes.

To the opinion before expressed, that the depositions as a whole should not have been excluded, we adhere.

Petition for rehearing denied.

Scanlan v. Wheeler.

Scanlan v. Wheeler.

51	179
66	679
51	179
85	384
51	179
101	154

1. **EXCEPTIONS—How Preserved.**—Exceptions can only be preserved by the certificate of the judge to a bill of exceptions; and a cause will not be reversed for an erroneous ruling, unless an exception thereto has been taken in the court below.

2. **APPEALS—What is Brought Up.**—An appeal from an order overruling a motion to vacate a judgment does not bring up the question of the propriety of the judgment entered at a preceding term.

Memorandum.—**Assumpsit.** Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

BURTON & McLAUGHLIN, attorneys for appellant.

TENNEY, CHURCH & COFFEEN, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit upon a promissory note. The only plea was the general issue. By agreement of parties a jury was waived and the cause submitted to the court for trial. The court heard the evidence, found the issues for the plaintiff, and rendered judgment in his favor and against the defendant.

There was no objection to the evidence offered, and no exception was taken to the finding or any other ruling of the court; there was no motion for a new trial, and no preservation by bill of exceptions, of the evidence on which the court based its finding and judgment, or of any ruling by the court.

The order of judgment recites that "the defendant having entered his exceptions herein," but it nowhere appears what the exceptions applied to. A recital of that kind by the clerk does not preserve exceptions. *Van Cott v. Sprague*, 5 Ill. App. 99.

Exceptions can only be preserved by the certificate of the judge to a bill of exceptions; and a cause will not be re-

versed for even an erroneous ruling unless an exception thereto has been taken in the court below. The judgment was entered at the January term, 1893, of the court, and an appeal therefrom prayed and allowed, but at the February term next ensuing, the appeal was withdrawn and a motion made to vacate the judgment, first, on the ground of usury, and second, of alteration in or forgery of some of the terms of the note. In support of and opposed to that motion, affidavits were introduced and read, and oral testimony heard by the court, who, upon consideration of the same, overruled the motion, and an appeal was prayed and allowed.

Again, the only manner in which an exception to the ruling of the court was attempted to be preserved, was by a recital in the order overruling the motion of "the defendant, having entered his exceptions herein," which as we have already seen was not sufficient. The appeal from the order overruling the motion to vacate the judgment does not bring up the question of the propriety of the judgment entered at the preceding term. *Nat. Ins. Co. v. Chamber of Commerce*, 69 Ill. 22.

The only thing brought to this court by this appeal, is the propriety of the order overruling the motion to vacate the judgment. Although we have looked at the evidence presented to the court on that motion and think the equities of the case largely favor the conclusion arrived at by the court, we rest our decision upon the absence of any properly preserved exception to the ruling of the court on the motion, and affirm the same.

**Bayor v. The Estate of Herman Schaffner & Co.,
Insolvents.**

1. **TRUST FUNDS—*Special Deposits—Voluntary Assignments.***—In order to impress a trust upon moneys deposited in a bank so that they may be reclaimed as against the general funds of the bank, they must be susceptible of identification as distinct from other funds, and must not be so mixed up or mingled with other moneys as to be incapable of specific separation.

Bayer v. Estate of Schaffner & Co.

2. TRUST FUNDS—*Special Deposits—Application of the Rule.*—A person holding a certificate of deposit for \$2,900, went to the bank and drew \$200; having some suspicions as to the soundness of the bank, contemplated drawing out the balance, but finally concluded to take a certificate for it and it was agreed that the money should be put away in a separate package and kept until he should come again for it as he needed it. The money was not put away according to the agreement, but was left in fact as it was before, a credit upon the books of the bank. The bank failed. *It was held* that the depositor was not entitled to a preference over the other creditors.

Memorandum.—Proceedings under the act concerning assignments for the benefit of creditors. Appeal from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

W. B. CUNNINGHAM, attorney for appellant; SAMUEL B. KING, of counsel.

MORAN, KRAUS & MAYER, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The firm of Herman Schaffner & Co. was engaged in the banking business, in Chicago, for a considerable period, and on June 3, 1893, made an assignment for the benefit of creditors.

At the time the assignment was made, the appellant was the holder of a certain certificate of deposit issued to her by said banking firm, of which the following is a copy:

“CERTIFICATE OF DEPOSIT.

\$2,700.00.

HERMAN SCHAFFNER & Co.,

No. 6,501.

CHICAGO, June 1, 1893.

Susan Bayer has deposited in this bank twenty-seven hundred (2,700) dollars, payable to the order of herself on the return of this certificate.

Countersigned, HERMAN SCHAFFNER & Co.

A. SCHWARTZ, Teller.”

That certificate was the last one of eight certificates of deposit, precisely alike in form, and varying only in dates and amounts, which had been issued by the firm to appellant. The first certificate was for thirty-four hundred dollars and was issued and bore date on April 26, 1893.

The circumstances under which the first certificate was issued, were substantially as follows:

Mr. W. B. Cunningham was a depositor and kept a general account with said banking firm. Being indebted to the appellant for moneys received for her in the sale of some real estate, Mr. Cunningham drew his check on said firm in favor of the appellant for the sum of thirty-four hundred dollars and accompanied her and her husband to the bank. Arriving at the bank, Cunningham asked appellant if she wanted the money or wanted to leave it in the bank.

No suspicions existed at that date of the solvency of the banking firm. Appellant replied that she did not want the money, but would prefer to leave it there temporarily. Expressing a further wish not to open an account with the bank, against which she could check, Mr. Cunningham referred her to the teller to arrange matters in accordance with her wishes, and went away. It was thereupon arranged between her and the teller of the bank that she should receive fifty dollars in cash and a certificate of deposit for the balance of the check, \$3,350, payable to her order on demand, dated that day, April 26, 1893, and it was so done, and such certificate was delivered to her by the teller, with the remark: "If you want any of this money come down and surrender this certificate and I will give you another."

Three days later, on April 29th, the appellant surrendered that first certificate, drew two hundred dollars and took a new certificate of deposit for three thousand one hundred and fifty dollars.

The same conduct was repeated on May 2d, when appellant drew \$50; on May 11th, when she drew \$50; on May 17th, when she drew \$50; on May 19th, when she drew

Bayor v. Estate of Schaffner & Co.

\$50; and on May 27th, when she drew \$50; the appellant in each instance taking a new certificate of deposit for the reduced amount, the last one, issued on May 27th, being for the sum of \$2,900.

After the first transaction, resulting, as stated, in the giving to appellant of the first certificate of deposit for \$3,350, the appellant does not appear to have been personally present in the bank, but was represented there by her husband, whom she had authorized to draw the sums mentioned and take new certificates payable to her order.

Down to this point there can be no question, as one of law, that the relation of creditor and debtor was all that existed between appellant and the bank. The bank owed its depositor, Cunningham; he owed appellant and gave her his check against his account in the bank. She presented the check and took fifty dollars in cash and a certificate of deposit for the balance.

The funds of the bank were not thereby in any wise changed. It amounted simply to an exchange of appellant's demand against Cunningham for one against the bank. Cunningham was discharged, and the bank substituted as appellant's debtor. And so the appellant's counsel, with characteristic candor, to the court admits, for in his brief he says: "That the deposit in this case was, at its inception, a general deposit, and so continued to be until June 1, 1893, may be conceded."

It has been necessary, however, to state the transactions up to this time in order that light may be shed upon what followed. On the first day of June, 1893, the appellant again sent her husband to the bank with the certificate for \$2,900 which was issued on May 27th, duly indorsed by the appellant, as had been the case with all the previously surrendered certificates. The only substantially controverted question of fact presented on the record, is as to what occurred between the husband of appellant and Mr. Schaffner, on the first of June, when the former was in the bank with the \$2,900 certificate. Mr. Schaffner died shortly afterward, and his testimony was, in consequence, never

heard upon the question. The occurrences and conversation at that time between Mr. Bayor, the husband of appellant, and Mr. Schaffner, the principal member of the banking firm, are related in the testimony of Mr. Bayor, and a Mr. Scott, who were called as witnesses for appellant.

It is strenuously insisted by counsel for appellee that there are such inconsistencies between the testimony of the witnesses Bayor and Scott, and such contradictions in the testimony of each of them, as to discredit their evidence, but we do not propose to follow counsel in an analysis of their testimony. It may be assumed that their testimony is in substance true, and that it is proven in the case, that when Mr. Bayor went into the bank on June first, for the purpose of surrendering the \$2,900 certificate and getting \$200 in cash and a new certificate for \$2,700, he observed a condition of things which made him suspicious of the soundness of the bank, and that he then partly concluded to withdraw all the money represented by the certificate, but before fully deciding upon what he should do he had a conversation with Mr. Schaffner, in which it was agreed between himself and Mr. Schaffner that he should draw out \$200 and take a certificate of deposit for the remaining \$2,700, and that the \$2,700 so left should be put away in a separate package and kept until he should come again for it as he needed it.

Coupled with such assumption the further fact must be considered, that neither the \$2,700, nor any part of it, was ever separated from the other funds of the bank, or put away in a separate package for the appellant or her husband, but remained just as it always had existed, as a mere credit to appellant on the books of the banking firm. Under such circumstances was the general fund in the hands of the assignee of the banking firm, impressed with a trust in favor of appellant for the amount of the certificate of deposit for \$2,700 issued to her on said June first? The County Court held that it was not, and dismissed the appellant's petition for want of equity, and we are asked to reverse that judgment. We can not do so. The County Court was clearly right. In order to impress a trust upon moneys deposited

Bayer v. Estate of Schaffner & Co.

in a bank so that they may be reclaimed as against the general funds of the bank, they must be susceptible of identification as distinct from other funds, and must not be so mixed up or mingled with other moneys as to be incapable of specific separation. *Mutual Accident Association v. Jacobs*, 141 Ill. 261; *Wetherell v. O'Brien*, 140 Ill. 146; *Union National Bank v. Goetz*, 138 Ill. 127; *School Trustees v. Kirwin*, 25 Ill. 73; *Illinois Trust and Savings Bank v. First National Bank*, 15 Fed. Rep. 858; *Commercial Nat. Bank v. Armstrong*, 39 Fed. Rep. 684.

It may be that cases can be found in some other States wherein the general rule above stated has been departed from under peculiar circumstances, but the law of Illinois is too well settled on the question to admit of argument.

In this case there never existed from inception to conclusion, a single dollar nor any fund represented by the certificate of June 1st, that could have been distinguished from any other dollar or fund held by the bank.

The entire transaction from beginning to end consisted merely of an exchange of credit by the bank from one of its customers to another, and in a change in the amount of such credit, from time to time, as it was reduced by payments on account of it.

If Schaffner had fulfilled his agreement, and separated and kept apart from the other moneys of the bank, the particular sum of \$2,700, or any part of it, for and as appellant's peculiar property, a different question would have arisen.

But it is useless to speculate as to what appellant's rights would have been under a different state of facts.

The principle decided in *Starr Cutter Co. v. Smith*, 37 Ill. App. 212, having been repudiated in *Wetherell v. O'Brien*, *supra*, the former case can no longer be considered as binding upon this court.

The conclusion we have arrived at renders it unnecessary for us to consider the motion of appellee to strike the bill of exceptions from the record.

The judgment of the County Court will be affirmed.

McCord et al. v. Massey.

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155s 123

51 186
200s 475

1. **CONTRACTS FOR CONVEYANCES—*Inchoate Right of Dower.***—Where a party has contracted to convey lands with covenants of general warranty, or against incumbrances, an existing right of dower, although inchoate, will constitute a good defense to a proceeding on the part of the vendor for a specific performance of the contract, unless the vendee has waived the right to object to the title. The rule is the same where the vendor institutes an action at law against the purchaser to recover damages for non-performance of the contract.

2. **CONTRACTS FOR CONVEYANCES—*Construction of Title.***—A contract to give good and sufficient deed is a contract to give a good title, free from incumbrance.

3. **INCUMBRANCE—*Inchoate Right of Dower—Damages.***—An inchoate right of dower is an incumbrance; and the covenantee can recover the damages sustained by him, on account of such incumbrance, not exceeding the consideration money and interest.

4. **INCUMBRANCE—*Right of Recovery upon Removal.***—Where a covenantee extinguishes an incumbrance, he can recover the amount which he has fairly and reasonably paid for this purpose, the burden of proof being upon him to show that the incumbrance was really worth what he has paid, the mere fact of payment being, in general, no evidence of this.

5. **INCUMBRANCE—*Recovery upon Removal—A Better Rule.***—It would seem to be a better rule that where the covenantee has given notice to the covenantor to remove an incumbrance, and he, a reasonable time having passed, has failed to do so, if the covenantee then in good faith proceeds to buy up the incumbrance, proof of such facts would constitute *prima facie* evidence that the amount paid was reasonable.

Memorandum.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

STATEMENT OF THE CASE.

On the first day of September, 1890, appellee and appellants entered into a written agreement, whereby appellee agreed to sell to appellants certain premises situated in the county of Cook and State of Illinois, containing fourteen and sixty-eight hundredths acres, more or less. Appellants agreed to pay for said premises \$17,000, and appellee agreed

to convey the same to appellants, or their assigns, by good and sufficient warranty deed, conveying good title to said premises. Appellants also agreed to subdivide said premises and to make a sale for the choice of lots of such subdivision, and devote the money derived from the sale for the choice of lots, toward the payment of part of the purchase money. Part of the purchase money was to be paid in cash and the balance by purchase money trust deeds upon the lots of such subdivision. Appellee also agreed to furnish a complete abstract of title to said premises.

The abstract of title was furnished to appellants, who had their attorney examine the same; he pronounced the title to said premises good in appellee, free and clear of all liens and incumbrances. Appellants paid \$8,000 in cash on account of the purchase price and delivered to appellee trust deeds amounting to \$2,286.85, and appellee himself took one of the lots to an agreed valuation of \$643.45.

Subsequently appellants discovered that the wife of one William Duhn had an inchoate right of dower in said premises, and thereupon refused to pay the balance of the purchase price. This suit was then instituted in the Superior Court of Cook County by appellee for the recovery of the balance claimed to be due him on account of the purchase price of said premises.

Appellants having notified appellee of the dower right of Mrs. Duhn, asked him to procure a release of the same; he made some effort to do so, but failed, and some time thereafter appellants, by paying to Mrs. Duhn the sum of \$5,500, obtained a quit-claim deed from William Duhn and wife to appellee, releasing her dower.

Upon the trial the court found the issues for the plaintiff, and assessed his damages at \$6,916.13, being the face and interest of the unpaid purchase money notes. From the judgment thereon rendered this appeal is prosecuted.

CAMPBELL & CUSTER, attorneys for appellants.

RUNYAN & RUNYAN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The principal question presented in this case is whether an inchoate right of dower is such an incumbrance upon or defect in the title of premises, that a party covenanting to convey good title by a good and sufficient warranty deed, is bound to remove the same or pay such damage as the covenantee has suffered by reason of such right of dower.

In *Scribner on Dower*, Vol. 2, p. 4, it is stated that "Where a party has contracted to convey lands with covenants of general warranty, or against incumbrances, an existing right of dower, although inchoate, will constitute a good defense to a proceeding on the part of the vendor for a specific performance of the contract, unless the vendee has waived the right to object to the title. The rule is the same where the vendor institutes an action at law against the purchaser to recover damages for non-performance of the contract."

A contract to give a good and sufficient deed is a contract to give a good title free from incumbrance. *Rawle on Covenants for Title*, Sec. 32; *Carpenter v. Bailey*, 17 Wend. 244; *Fletcher v. Button*, 4 Comstk. 400; *Pomeroy v. Drury*, 14 Barb. 424; *Brown v. Cannon*, 5 Gil. 174; *Morgan v. Smith*, 11 Ill. 199; *Thompson v. Shoemaker*, 68 Ill. 256.

An inchoate right of dower is an incumbrance. *Rawle on Covenants for Title*, Sec. 77; *Shearer v. Ranger*, 22 Pick. 447; *Bigelow v. Hubbard*, 97 Mass. 195; *Fitts v. Hoitt*, 17 N. H. 530; *Jones v. Gardner*, 10 Johnson 266; *Ketchum et al. v. Evertson*, 13 Johnson, 359; *Beardslee v. Underhill*, 37 N. J. Law, 310; *Porter v. Noyes*, 2 Greenl. 22; *Carder v. Executors*, 3 Zabriskie, 260; *Greenwood Lyon*, 10 Smedes & Marshall, 615; *Parks v. Brook*, 16 Ala. 529; *Bitner v. Brough*, 11 Pa. St. 127, 137.

The covenantee can recover the damages sustained by him, on account of such incumbrance, not exceeding the consideration money and interest. *Brooks v. Moody*, 20 Pick. 474; *Porter v. Bradley*, 7 R. I. 538; *Delavergne v. Norris*, 7 Johnson, 359; *Green v. Tallman*, 20 N. Y. 191;

Bitner v. Brough, *supra*; Prescott v. Trueman, 4 Mass. 628; Batchelder v. Sturgis et al., 3 Cush. 201; Harlow v. Thomas, 15 Pick. 66; Hatcher et ux. v. Archer, 5 Bush (Ky.) 561; Whistler v. Hicks, 5 Blackf. 100; Sedgwick on Dams., Sec. 979; Willets v. Burgess, 34 Ill. 494.

If the covenantee has extinguished the incumbrance he can recover the amount which he has fairly and reasonably paid for this purpose, the burden of proof being upon him to show what the outstanding title or incumbrance was really worth, the mere fact of payment being, in general, no evidence of this. Rawle on Covenants for Title, Sec. 192; Harlow v. Thomas, 15 Pick. 66; Anderson v. Knox, 20 Ala. 156; Dickson v. Desire, 23 Mo. 167; Walker v. Deaner, 5 Mo. App. 139; Pote v. Mitchell, 23 Ark. 590; Sedgwick on Dams., Sec. 980; Guthrie v. Russell, 46 Ia. 269; Brandt v. Foster, 5 Ia., 287.

It would seem to the writer of this opinion that the better rule would be that, where the covenantee has given notice to the covenantor to remove an incumbrance, and he, a reasonable time having passed, has failed to do so, if the covenantee then in good faith proceed to buy up the incumbrance, proof of such facts would constitute *prima facie* evidence that the amount so paid was reasonable, as to which see, Newell v. Sass, 43 Ill. App. 579; Kelroy v. Remer, 43 Conn. 129-138; Clapp v. Hardman, 25 Ill. App. 509-515; Coburn v. Litchfield, 132 Mass. 449; Hildreth v. Fitts, 53 Vt. 684-690; Hartshorn v. Cleveland, 19 Att. Rep. 974; Atchinson v. Steamboat, 14 Mo. 63-69.

The majority of the court think otherwise, and I am not prepared to say that the authorities go to such extent.

In Anderson v. Knox, *supra*, the plaintiff proved what he had paid to remove an incumbrance, and then offered to show that the sum paid was reasonable; to this offer the defendant's objection was sustained; a verdict and judgment for the plaintiff, on the evidence admitted, was reversed by the Supreme Court, the court saying that unless proof was made that the amount paid was reasonable, a judgment therefor could not be sustained.

The action of the Alabama court in allowing the defendant the benefit of an error he had caused, is opposed to the action of this court in *Stearns v. Reidy*, 33 Ill. App. 246; nevertheless, the decision is an authority for the position that proof that the amount paid was reasonable must be made.

No sufficient evidence that the amount paid was reasonable having been given in the case at bar, the judgment for the plaintiff for the amount of the purchase money notes is therefore affirmed.

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County of Cook v. T. E. Ryan, Administrator of the Estate of Francis R. Murphy, Deceased.

1. **COUNTIES—Audit of Bills, etc.**—Where goods are furnished to a county, bills therefor presented according to law to the county board, and appropriate committees report that, having had the bills under advisement, they recommend the payment of them, and thereupon the county board, in regular session, adopt such reports and order the bills paid, *it was held*, with such orders of the board, no independent proof of the delivery of the goods or of the quantities or prices was necessary. The orders have all the effect of an account stated between individuals.

2. **COUNTIES—Audit of Bills—What Conclusive of.**—An audit of a bill by a county, when the auditors are not fraudulently imposed on and act within their jurisdiction, is undoubtedly conclusive, until in some way reversed, as to the liability of the county for the amount audited. But it is conclusive for nothing more, and this is true of every audit made by county supervisors and town boards of auditors. When the auditors honestly allow a claim, acting within their jurisdiction, and no fraud has been practiced upon them in procuring the allowance, the liability of the municipality is fixed, and the claim is no longer subject to dispute.

3. **COUNTIES—Power to Rescind Acts of Auditing Committee.**—Where a bill for goods furnished has been audited by a municipal corporation it has no power to rescind the audit at a subsequent meeting. Perhaps by virtue of a rule providing that such an action of the board at one meeting might be reconsidered at the next, the board might rescind the audit at the next meeting; but an attempted rescission after the lapse of many months, during which meetings were held every week, is ineffectual.

4. **FRAUD—Finding of Trial Court, When Conclusive.**—The finding of the court, trying the cause without a jury, concludes the Appellate Court upon the question of fraud.

County of Cook v. Ryan.

5, LIMITATIONS—*County Orders*.—The action of the board ordering the payment of certain bills was more than five years before the commencement of a suit. *It was held* that if the plaintiff had any case, it was upon the orders for the payment of his bills, these matters all being in writing, and if there is any evidence of indebtedness it is in writing, to which ten years is the limitation under Sec. 16, Ch. 83, R. S.

WATERMAN, J. dissenting.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed April 19, 1894.

The statement of facts is contained in the opinion of the court.

JAMES MAHER, attorney for appellant.

APPELLEE'S BRIEF, RICHARD PRENDERGAST, ATTORNEY.

It can be fairly stated that the weight of authority in and out of this State, is that the allowance by a county auditing body under such statutory powers as exist here, of a claim that might properly be a legal charge against the county—that is, in a matter that they rightly had jurisdiction to allow—is conclusive against the county, and can not subsequently be rescinded by the board or by its successors in office, or be collaterally attacked.

In other States this doctrine is fully established. *People v. Schenectady*, 35 Barb. 408; *Arthur v. Adam*, 49 Miss. 404; *State v. Buffalo Co.*, 6 Neb. 454.

In Michigan, supervisors have exclusive power to adjust claims against county. *Endriss v. Chippewa Co.*, 43 Mich. 317.

To the same effect is *People v. Fitzgerald*, 54 How. Pr. 1.

So in Arkansas. *English v. Chicot Co.*, 26 Ark. 454; *Tiltham v. Same*, 26 Ark. 461.

So in Indiana. *McCoy v. Atte*, 30 N. E. Rep. 528; *State v. Connor*, 5 Blackf. (Ind.) 325; *Gaston v. Com'rs*, 3 Ind. 497; *Board v. La Grange Co.*, 7 Ind. 6; *Snelson v. State*, 16 Ind. 29; *Com'rs v. Gregory*, 42 Ind. 32.

Again in Wisconsin. *State v. Supervisors of Crawford Co.*, 30 Wis. 596.

And in California, New York, Pennsylvania, Ohio, etc. *Colusa Co. v. De Jarnett*, 55 Cal. 373; *McFarland v. McComen*, 33 Pac. Rep. 113; *People v. Collins*, 19 Wend. 56; *Brown v. Otoe Co.*, 6 Neb. 111; *Burnett v. Portage*, 12 Ohio, 58; *Chicago v. Birdsoll*, 4 Wend. 455; *Northumberland Co. v. Bloom*, 3 Watts and Son (Penn.), 542; *Ryan v. Dakota Co.*, 32 Minn. 138; *People v. Rensselaer Co.*, 34 Hun (N. Y.) 236; *Cass Co. Com'rs v. R. R. Co.*, 88 Ind. 199.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action for goods sold and delivered to the county by Francis R. Murphy in his lifetime—the appellee being his administrator. It is unnecessary to refer to the pleadings, as upon the trial it was stipulated, in effect, that the cause should be determined upon the merits, as they might appear from the evidence.

The evidence on the part of the appellee which we regard as controlling the case, is that bills for the goods were rendered to the county by the Chicago Pharmaceutical Company; that Murphy was conducting business under that name; that in the regular order of business, in the mode adopted by the county board, appropriate committees reported that having had the bills under advisement they recommended the payment of them, and thereupon the county board, at regular sessions of the board, adopted such reports, and ordered that the bills be paid.

Among the powers of the county board was “to examine and settle all accounts against the county.” Third clause, Sec. 25, Ch. 34, Counties, R. S. 1874. The law contemplated that upon such orders of the county board, the clerk and treasurer of the county would act. Ch. 35 and 36, R. S. 1874. With such orders of the county board, no independent proof of the delivery of the goods, or of quantities or prices was necessary. The orders had, at least, all the effect of an account stated between individuals. “Such an audit, when the auditors are not fraudulently imposed

on and act within their jurisdiction, is undoubtedly conclusive, until in some way reversed, as to the liability of the city for the amount audited, and it can not be collaterally overhauled or attacked. But it is conclusive for nothing more, and this is true of every audit made by county supervisors and town boards of auditors. When the auditors honestly allow a claim, acting within their jurisdiction, and no fraud has been practiced upon them in procuring the allowance, the liability of the municipality is fixed, and the claim is no longer subject to dispute." These sentences are quoted from the opinion of the court in *Nelson v. Mayor, etc.*, of New York, 131 N. Y. 4, where it is true they were *obiter*, but they express the rule of law accurately. The rule was followed by the Supreme Court in *Fitzgerald v. Harms*, 92 Ill. 372, and recognized by this court in *Lundberg v. Boldenwick*, 35 Ill. App. 79.

Such was the rule enforced in *Mayor v. Wright*, 2 Porter (Ala.) 230; *Brown v. Inhabitants, etc.*, 79 Maine, 305; *Hall v. Inhabitants, etc.*, 116 Mass. 172; all of which also deny the power of the municipality to rescind the audit at a subsequent meeting. This last position is, so far as we are advised, nowhere denied, unless in North Carolina. See *Dey v. Lee*, 4 Jones' Law, 238. Perhaps by virtue of a rule of the board, shown by the record, providing that action of the board at one meeting might be reconsidered at the next, the board might rescind the audit at the next meeting; but the attempted rescission here, was after the lapse of many months, during which meetings were held each week.

The prohibition in Ch. 146 a, R. S., against warrants when there is no money in the treasury, has no relation to auditing accounts, nor is there any evidence of an excess of indebtedness by the county in violation of Sec. 12, Art. 9, of the constitution.

The record does show that Murphy was in the service of the county, and the goods which he furnished under his business name, as a company, he also received for the county. Certainly that has a bad aspect, but there is in the

record the testimony of a witness, also a servant of the county, and to whom Murphy was subordinate, that he examined the goods as received, and found that all that were charged were received, and charged at low prices.

The finding of the court, trying the cause without a jury, concludes us upon the question of fraud. The action of the board ordering the payment of the bills was all more than five years before the commencement of this suit; but if the appellee has any case, it is upon the allowance of, and the orders for the payment of, his accounts rendered to the county board.

These matters are all in writing, and if there be any evidence of indebtedness, it is in writing, to which ten years is the limitation under Sec. 16, Ch. 83, R. S. 1872.

On the whole case the judgment of the Circuit Court for the appellee is affirmed.

MR. JUSTICE WATERMAN, DISSENTING.

From the bill of particulars filed and evidence introduced by the plaintiff in this case, it appears that, in the years 1886, 1887 and 1888, the county of Cook received from the Chicago Pharmaceutical Company certain drugs and hospital supplies. Bills for such supplies were, from time to time, rendered to the county by said company, the form of the bills being substantially as follows:

COOK COUNTY HOSPITAL
Sanitary Supplies.
Bought of the CHICAGO PHARMACEUTICAL Co.,
Druggists and Importers,
No. 61 Lake Street.

Order book....

Folio....

Shipped....

Represented by A. J. Walker.

B 1089 lb. Sal. Soda, 3 bbls. 105 3 $\frac{1}{4}$ 39.17

COOK Co. HOSPITAL.

Certified correct.

W. J. MCGARIGLE, Warden.

The affidavit of A. J. Walker is attached to the various bills; in this affidavit said Walker makes oath that he is

County of Cook v. Ryan.

collector for the claimant named in the claim hereto attached, that the several items therein mentioned are just and true, etc., and that there is now due and unpaid to said Chicago Pharmaceutical Co., the sum of (amount of bill).

Some of the bills have on them "Certified correct, H. S. Varnell, Warden," and most of them have thereon,

"O. K.

"O. K.

Jno. J. Doherty."

F. R. Murphy."

McGarigle, Varnell, Dougherty and Murphy, were all in the employment of the county; Dougherty was chief clerk of the County Hospital, and Murphy was druggist at the hospital; in the employment of the county, Dougherty was in the employment of the county and also of Murphy. On the bill of particulars a claim for \$1,000 for the services of said Murphy is made, and it is stated in the bill of particulars that warrants for said services were issued, as well as for drugs and hospital supplies furnished. It also appeared that a committee of the board of county commissioners, to whom the bills of the Chicago Pharmaceutical Company were presented, recommended their payment, and that such reports were adopted and the bills ordered paid. No warrants for any of these bills appear to have been issued. Some months after the passage of the order that the bills be paid, the board of county commissioners rescinded its action approving the bills and directing that they be paid.

The majority of the court are of the opinion that the allowance of these bills by the county board fixes the liability of the county therefor.

As, under the stipulation, all defenses are admissible, we are at liberty to inquire what the evidence is as to such action of the county having been obtained by fraud on the part of Francis R. Murphy, in behalf of whose estate this claim is prosecuted.

What, according to the evidence, was done to induce the board to take the action it did?

First. The board was kept in ignorance of the all-important fact that these bills presented by and in the name

of the Chicago Pharmaceutical Company were really accounts belonging to and for druggists' goods supplied by Francis R. Murphy, the druggist employed, and paid by the county to protect its interests in respect to the matter of the purchase of these very goods.

It does appear that certain members of the board, as individuals, were informed that Francis R. Murphy was doing business as the Chicago Pharmaceutical Company, but it nowhere appears that the board, as a board, had either knowledge or notice of such fact.

Second. The board was kept in ignorance of the fact that the "O. K." placed upon these bills and the signature of Francis A. Murphy thereto was the certificate by its trusted employe to the correctness of his own bill for goods furnished apparently by another party.

Third. The board was kept ignorant of the fact that John T. Dougherty, whose "O. K." above his signature was also on these bills, while a servant of the county and paid by it, was actually in the employment of Francis R. Murphy, doing business as the Chicago Pharmaceutical Company.

Fourth. That Francis R. Murphy was violating the penal statutes of this State by, without warrant, assuming what purported to be a corporate name.

Can any intelligent man, not to say any business man, believe that if these facts had been known, the bill would have been allowed without an examination much more thorough than, in the absence of such extraordinary circumstances so calculated to arouse suspicion, and facts so pregnant with fraud, would have been made?

Can any man truthfully say that if the entire facts had been known, the certificate of W. J. McGarigle and H. S. Varnell and the affidavit of Walker would have been deemed sufficient? Would not, upon the presentation of the facts this record discloses, a most thorough investigation as to the delivery, weight, quality, price and necessity for and of each article have been had?

Finally, is it the law that an allowance of bills by a municipal body, obtained under such circumstances, is binding upon it?

County of Cook v. Ryan.

Fraud vitiates all acts. The county of Cook acts entirely through agents. If they conspire against it, league to deceive it, it is not bound by what they, for their profit, may by such deception for their gain, induce it to do. No allowance of any account to Francis R. Murphy was ever knowingly made. No warrant to *him* ever ordered.

I am also of the opinion that the action of the board in rescinding the order for payment of these bills, deprives the plaintiff of any right to recover by reason of such order of payment.

In Dillon on Municipal Corporations, Sec. 290, it is said: "At any time before the *rights of third persons* have vested, a council or other corporate body may, if consistent with its charter and rules of action, *rescind previous votes and orders.*"

The cases in which such right to rescind has been sustained are numerous. Among them are Estey et al. v. Starr et al., 56 Vt. 690; Tucker v. The Justices of Iredell County, 13 Iredell (N. C.), 434; Bigelow v. Hillman, 37 Me. 52, 58; Wilmington v. Inhabitants of Harvard, 8 Cushing (Mass.), 66-68; Getchell v. Inhabitants of Wells, 55 Me. 434-438; Huneman et al. v. Inhabitants of Grafton, 10 Metcalf, 454-456.

The right of Murphy to be paid by the county, depended upon his having furnished goods to the county. He did not supply any goods or do anything upon the strength or faith of the allowance of any of these bills; the allowance, nothing having been done upon the faith thereof, and the rights of no third parties having intervened, is a thing which can be rescinded.

It is not like the case of the awarding of a contract, or the acceptance of a bid. I can not agree to an affirmation of the judgment rendered in this case.

Nelson v. Halfen.

1. **BUILDING CONTRACTS—*Architect as Arbitrator.***—In building contracts, where the architect is made an arbitrator in cases of dispute between the owner and contractor, and that his decision shall be final and binding upon all parties, *it was held* that as such arbitrator he has, as a general rule, power to construe the contract.

Memorandum.—**Assumpsit.** In the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Appeal by the defendant. Heard in this court at the October term, 1893, and affirmed. Opinion filed April 19, 1894.

The statement of facts is contained in the opinion of the court.

THORNTON & CHANCELLOR, attorneys for appellant.

M. W. ROBINSON, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was a plumber, and a sub-contractor, under one Williams, to do the plumbing work in and about a building which Williams had contracted to erect for appellant.

The original specifications and contract between the owner, appellant, and the contractor, Williams, called for the water supply to extend to the main pipe in the street, but the contract between Williams and the sub-contractor required the supply pipe to extend no further than to the curb wall of the street.

When the owner saw that appellee was starting the supply pipe from the curb, and not from the main in the street, he objected, and afterward, in order to arrange the matter, they met with the architect, who talked over the controversy with the parties, and after some independent conversation between the owner and himself, in a language not understood by the appellee, told the appellee in the presence and hearing of appellant, to go ahead and extend

the supply pipe into the street, and he would see that he got his pay.

The parties, appellant and appellee, then went together to obtain a permit for digging up the street. As to what, if anything, further was then or afterward said between them as to whether the appellant would or would not pay for doing the work directed by the architect to be done, the parties conflict in their testimony, and the finding of the court as to the truth of the matter ought not to be disturbed.

The conduct of the appellant at the time the architect directed the work to be done, indicated, and the appellee was justified in inferring, that the promise of the architect to see that he got his pay was authorized by the appellant. Relying on that promise, the appellee performed the work, and the appellant refusing to pay for it, suit was begun and judgments recovered by the appellee in both the Justice's Court and Superior Court, for the value of the work, \$21.90.

It appears by the written contract between the owner and the contractor, that the architect was made arbiter in cases of dispute between the owner and contractor, and that in all cases of doubt his decision should "be final and binding on all parties," and that the contractor was to be paid upon the architect's certificates.

Undoubtedly the architect had the power to require Williams, the contractor, to extend the supply pipe to the street main, or to withhold from the contract price such a sum as it should cost to do so.

The owner and the architect having within themselves the power to protect not only themselves, but the sub-contractor also, as against the contractor, whose duty it was to perform the work, the appellee, sub-contractor, might well have understood that they would do so and pay him out of money which otherwise would be paid to the contractor.

Such an understanding would not be inconsistent with the statement made by appellant that he would not pay him, the appellee, for if the architect and owner had done what

they had the right to do by withholding from the contractor the cost of doing the work, and giving it to appellee, it would in legal effect have been a payment to the contractor and not to the appellee.

If, however, a different view of the effect of the testimony of the parties should be taken, then the rule will apply, that where the evidence is uncertain and conflicting, the finding of what is the truth of it, by the court before whom the witnesses appeared and testified, will not be disturbed, unless for more weighty reasons than exist in this cause.

The judgment of the Superior Court will be affirmed.

MR. JUSTICE WATERMAN dissents.

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Ancient Order of United Workmen v. Holdom, Conservator of the Estate of Paul Holtz.

1. LUNATICS—*Criminal Responsibility*.—A lunatic is not criminally responsible for his acts, because criminal intent is the essence of crime, and criminal intent is wanting in the insane.

2. LUNATICS—*Civil Responsibility*.—Intent is not a necessary ingredient of civil liability, and so a lunatic is civilly responsible for his torts, and an action may be maintained against him therefor.

3. LUNATICS—*Responsibility—Public Policy*.—It would be manifestly against public policy to absolve lunatics from the civil consequences of their acts; the temptation to simulate insanity for purposes of mischief, revenge or gain, would, with persons of a low order, be very strong.

4. TORTS—*Committed by a Lunatic*.—A person can not be enriched by reason of torts by him committed while insane.

Memorandum.—Action on an insurance policy. In the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Declaration on policy; pleas, the general issue and a special plea, alleging that the appellee is the son and beneficiary of the insured, Carl Holtz, and that on December 15, 1890, the appellee killed and murdered the insured, by reason of which he forfeited and lost all rights as a beneficiary under the beneficiary certificate. Replication to special plea, charging that said Paul Holtz, the son and beneficiary of Carl Holtz, deceased, did not murder the said Carl Holtz on the 15th day of December, A. D. 1890, but that the said Paul Holtz did kill the said Carl Holtz on that day, while he, the

A. O. U. W. v. Holdom.

said Paul Holtz, was insane. General demurrer filed by appellant to replication. Demurrer overruled. Appellant elects to stand by its demurrer. Cause submitted to court on statement of facts, and finding against appellant for \$2,000 and costs of suit. Heard in this court at the October term, 1893. Reversed and final judgment entered for appellant. Opinion filed February 1, 1894.

The statement of the facts is contained in the opinion of the court.

APPELLANT'S BRIEF, JAMES MCCARTNEY, ATTORNEY.

In the text books it is laid down as contrary to public policy to permit a plea of insanity to be interposed as a defense to an action for damages done by the insane person to the property of an innocent party. Shearman & Redfield on Negligence, Sec. 57.

In Chitty's Pleadings, Vol. 1, *p. 76, it is said, "Although a lunatic is not punishable, criminally, he is liable to a civil action for any tort he may commit."

The reasons for the rule are, public policy, and the danger that if this defense should be allowed, it would present a strong temptation to persons to simulate insanity for purposes of mischief and revenge. Cooley on Torts, p. 97 *et seq.*; McIntyre v. Sholty, 121 Ill. 660; Greenwood on Public Policy, Pt. 1, Rule 11; Riggs v. Palmer, 22 N. E. Rep. 1888; Porter on Insurance, *129, 131 *et seq.*, Hatch, Adm'r, v. Mut. Life Ins. Co., 120 Mass. 520; Amicable Soc. v. Bolland, 4 Bligh N. S. 194; Prince, etc., Insurance Co. v. Palmer, 25 Beav. 605.

CASE, HOGAN & CASE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

One Carl Holtz obtained from appellant a policy of life insurance, the beneficiary, named, being his son Paul. Paul Holtz, while insane, killed his father, whereupon, a conservator of the insane son having been appointed, he brought suit to recover the insurance said to be due upon the policy issued upon the life of Carl Holtz.

Is the insane beneficiary of a life insurance policy entitled, upon his killing the insured, to the insurance money, is the question here presented.

If the distinction between the civil and criminal liability of the insane is kept in mind, there will be no difficulty in answering this question.

A lunatic is not criminally responsible for his acts, because criminal intent is the essence of crime, and criminal intent is wanting in the insane; but intent is not a necessary ingredient of civil liability.

The multitude of cases in which judgment is obtained for injuries resulting from negligence are not based upon an intent to do harm; on the contrary there is in them not only an entire absence of wrongful intent, but most often a desire to avoid injury to any one. Intent not being necessary, a lunatic is civilly responsible for his torts, and an action may be maintained against him therefor. Chitty's Pleadings, Vol. 1, p. 97; Shearman & Redfield on Negligence, Sec. 57.

It would be manifestly against public policy to absolve lunatics from the civil consequences of their acts; the temptation to simulate insanity for purposes of mischief, revenge or gain would, with persons of a low order, be very strong.

On account of public policy, as well as principle, an insane person may be proceeded against in the civil courts for the consequences of his torts. McIntyre v. Sholty, 121 Ill. 660; Cooley on Torts, p. 97; Greenhood on Public Policy, Pt. 1, Rule II; Hatch, Adm'r, v. Mut. Life Ins. Co., 120 Mass. 550; Amicable Society v. Bolland, 4 Bligh N. S. 194.

No one can tell how long an insane person may remain so; so soon as his reason is restored he is entitled to his liberty, and also, to his estate, enriched by whatever may have been added to it by his insane acts.

If Paul Holtz, while insane, had beaten a neighbor or his father, a civil recovery might have been had against him for the damage he had thus occasioned.

He can not be enriched by reason of torts by him committed while insane.

This is no time for removing any of the restraints upon passion which exist, or doing aught that may favor the

McDonald v. Watson.

thought that gain may come from the taking of human life.

The judgment of the Circuit Court is reversed, and the cause having been tried by the court below without a jury, final judgment for the appellant, defendant below, will be entered here.

McDonald v. Watson et al.

1. VERDICT AND JUDGMENT—*Conclusion of Law, etc.*—The verdict and judgment are merely the conclusion of the law from the proven facts.

Memorandum.—Assumpsit. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

KNIGHT & BROWN, attorneys for appellant.

HAMLIN, HOLLAND & BOYDEN, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit, the evidence in which unmistakably showed that the defendants thereto were in debted to appellees in the sum of \$373.95, whereupon, the defendants offering no evidence, the court instructed the jury to return a verdict for \$373.95.

It may be, as is urged by appellant, that immaterial and irrelevant testimony was admitted; but to the relevant and pertinent evidence establishing the plaintiff's claim, there was no reply, and the jury could not, with due regard to their oath, have rendered any other evidence.

The verdict and judgment are merely the conclusion of the law from the proven facts. The judgment is therefore affirmed.

Mandel v. The Swan Land & Cattle Company.

1. **PENALTIES—*Suit to Enforce—What is Not.***—A suit brought by a corporation to recover the amount of a call made by the directors upon shares of stock where the shares have been forfeited for the non-payment of the call upon which the suit is based, is not an attempt to enforce a penalty.

2. **STOCKHOLDERS—*Presumed to Have Knowledge of the Company's By-laws.***—Stockholders are presumed to know the provisions of the charter and by-laws of the companies in which they are members.

3. **BY-LAWS—*Result of Unreasonable Provisions.***—If the by-laws of an incorporated company are so unjust and unreasonable that courts will not enforce them, a forfeiture of a member's shares may be held to have been unwarranted and be set aside, but it will not be a defense to a suit brought by the company to collect assessments due upon the forfeited shares of stock of such member. Setting aside a forfeiture of his stock does not have the effect of paying his assessments.

4. **STOCKHOLDERS—*Effect of Unwarranted Proceedings for Forfeiture.***—If the proceedings taken under its by-laws by an incorporated company are unwarranted or inadequate, such proceedings do not affect a holder's title to his stock, but if such proceedings are regular and warranted, the company becomes the absolute owner of the stock.

5. **STOCKHOLDERS—*Status After a Forfeiture of His Stock.***—A stockholder whose shares have been forfeited under the by-laws of the company remains, notwithstanding such forfeiture, liable to pay all calls due at the time of forfeiture, under by-laws with provisions creating such a liability.

6. **STOCKHOLDERS—*Buying Shares—Contracts with Reference to By-laws.***—A person in purchasing shares in an incorporated company contracts with reference to its charter and by-laws and the laws of the country in which such company is created.

7. **CORPORATION—*Power to Contract for Interest—Foreign Corporation Same.***—A corporation doing business in this State can not contract to receive more than seven per cent interest, but a corporation of another State may, in that State, make a valid contract for interest at any rate permissible by the laws of that State, and may in this State bring suit and recover judgment according to the law of the State where its contract was made.

8. **CONTRACTS—*Validity—Law of the Place—Remedy.***—The validity of a contract is determined by the *lex loci contractus*. The relief afforded for a breach of contract is in accordance with the law of the forum where suit for breach is brought.

9. **CORPORATIONS—*Assessments upon Stock.***—The rule that assessments can not be made until the entire stock has been subscribed, has no reference to cases in which the corporation is authorized to begin and carry

Mandel v. Swan Land and Cattle Co.

on its contemplated business before its stock has all been taken. Where a company is to come into existence only upon the full amount of its stock being subscribed, it can not make and enforce payment of calls before it has passed its embryotic condition.

10. EVIDENCE—*Records of Corporations*.—Copies of the books, records, etc., of an incorporated company, examined and sworn to by a credible witness, are admissible in evidence to show that a call upon the stock has been made.

Memorandum.—*Assumpsit*. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

STATEMENT OF THE CASE.

This is a suit in assumpsit, brought in the Circuit Court of Cook County, on the 24th day of March, 1890, by the Swan Land and Cattle Company, limited, a corporation organized under the English "Companies' Act," against Emanuel Mandel, to recover the amount of a call made by the directors of the company upon shares of stock standing in the name of the appellant, which shares the company had already forfeited for non-payment of the same call upon which the suit is based.

There was a trial by the court, a jury being waived, and a judgment in favor of the appellee for the amount of the call and interest, from which an appeal has been prosecuted to this court. The declaration alleges, in substance, that the appellee was a corporation duly organized under the "Companies' Act" of Great Britain, and that the appellant owned 380 shares of its stock of the par value of £10 per share, on which only £6 per share had been paid in, and that on the 11th day of October, 1887, a call was made of £1, 2s. per share by the directors of the company.

The declaration further alleged that the articles of association of the company provided for forfeiture of stock, in case calls thereon were not paid, and that notwithstanding such forfeiture, the shareholders should remain liable for the amount of any call due thereon at the time of such forfeiture, together with expenses and interest thereon; that after

demand for payment of such call on the stock of the appellant, and on the 4th day of September, 1888, his shares were duly forfeited by resolution of the board of directors for non-payment; and it is claimed that the appellant, not having paid such call, is still liable for the full amount thereon, with interest, notwithstanding the forfeiture of his shares for its non-payment.

The appellant interposed pleas of *nul tiel corporation* and the general issue.

The printed statute of Great Britain, comprising what is generally known as the English "Companies' Act" of 1862, with its amendments, was offered in evidence. This statute in substance provides that seven or more persons, by subscribing their names to a memorandum of association, and otherwise complying with the statute in respect of registration, may form an incorporated company, with or without limited liability. The act contains the usual provisions prescribing the powers and duties of corporations, the manner in which they can be created, their business conducted, and how their affairs may be wound up and put into liquidation in case of insolvency.

Section 16 of said act is as follows:

"The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber, in the presence of, and be attested by, one witness at the least, and such attestation shall be a sufficient attestation in Scotland as well as in England and Ireland; when registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in

England and Ireland, to be in the nature of a specialty debt."

Section 39 of the articles of association or by-laws is as follows:

"Any member whose shares have been forfeited, shall, notwithstanding, be liable to pay, and shall forthwith pay to the company, all calls, installments, interest and expenses owing upon or in respect of such shares, at the time of the forfeiture, together with interest thereon from the time of forfeiture until payment, at the rate of five per cent per annum, and the directors may enforce the payment thereof if they think fit."

Appellant took an assignment of 304 shares, sending the deed of assignment to the company. Afterward, upon a second issue, seventy-six additional shares were issued by the company to him; he also received three dividends, two of which were upon his entire 380 shares.

The par value of each share was £10. Upon the shares owned by appellee, £6 only had been paid. The directors, in accordance with powers given to them by the articles of association, on October 21, 1887, made a call of £1, 2s., upon each share, which, upon appellant's shares, amounted to £418. Notice of this call was mailed to appellant, and he having failed to make payment, his stock was declared forfeited to the company.

This action is brought to recover the call of £1, 2s. per share, for non-payment of which said forfeiture was declared, being based upon section 39, above quoted.

OTIS & GRAVES, attorneys for appellant.

SWIFT, CAMPBELL, JONES & MARTIN, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is strenuously urged that section 39 of the articles of association is so unreasonable and unjust, that the courts

will not enforce it; that this suit is an attempt to enforce a penalty created by the laws of another sovereignty, and that this is never done; and it is also insisted that appellant was entitled to know what had been done with his forfeited shares, and to be credited with whatever the company had received therefor.

We see nothing unreasonable or unjust in the provisions of section 39, nor do we regard this suit as an attempt to enforce a penalty. Stockholders are presumed to know the provisions of the charter and by-laws of the companies in which they are members. Morawetz on Corporations, Sec. 591.

By becoming a holder of stock having a par value of £10 upon which only £6 had been paid, appellant obligated himself to pay when duly called upon £4 upon each of his shares; so soon as he was thus duly called upon to pay any portion of the unpaid £4 the amount of such call became a debt.

It is for this debt that the present suit was brought.

The defense to it is based entirely upon certain of the articles of association, and what has been done thereunder. If they are so unjust and unreasonable that courts will not enforce them, the forfeiture of appellant's shares may be held to have been unwarranted and be set aside, but a defense to this suit will not therefrom arise; the debt of appellant will not thus be paid.

This suit is brought to collect a debt, not to enforce a penalty; the penalty provided by the articles of association was the forfeiture of shares; with whether such forfeiture was legal or illegal, warranted or unwarranted, binding upon appellant, or a thing which affected him not, we have in this litigation nothing to do, and as to such declaration of forfeiture, the judgment in this case will establish nothing.

Whether appellee has sold or still retains the forfeited shares, is in this action immaterial. Save and by virtue of certain provisions of its articles, it could not forfeit at all; if they are incapable of enforcement, or if the proceedings

Mandel v. Swan Land and Cattle Co.

for forfeiture, taken thereunder, were unwarranted or inadequate, then appellant is yet the owner of the 380 shares, and any sale the company may have made of them is not binding upon him; if the forfeiture was in all respects regular and warranted, then the company became thereby the absolute owner of these shares and need not account for the proceeds thereof. The numerous cases cited by appellant to the effect that the amount of a call, for the non-payment of which stock has been forfeited, can not be collected, are all in respect to companies whose by-laws contained no provision like section 39.

But for that section it might well be held that the company having elected under its powers to forfeit shares, could not recover the amount of the call, for the non-payment of which the forfeiture was made; while in the present instance the right to recover such call, notwithstanding forfeiture, is plain; to this appellant agreed; all stockholders stood as to this, upon an equality, and we see no reason why appellant should be allowed to get rid of his unmistakable agreement.

That the stockholder remains, notwithstanding forfeitures, liable to pay all calls due at the time of forfeiture, is, under provisions like section 39, held in England, and as we think with good reason. Dawes case, 38 Law Journal, N. S. 512.

Appellant, in purchasing these shares, contracted with reference to the charter and by-laws of the corporation of which he became a member, and the laws of the country in which such company was created. Beach on Corporations, Sec. 148; Morawetz on Corporations, Secs. 374 and 375; First National bank of Deadwood v. Gustin Minerva Con. Mining Co., 42 Minnesota 327.

We do not regard section 26 of chapter 32, entitled Corporations, of the statutes of this State, as having any bearing upon this case. Appellee did not undertake to do business in this State, and it is now merely attempting to enforce the payment of a debt created in and in accordance with the laws of another sovereignty.

A corporation doing business in this State can not contract to receive more than seven per cent interest, but a corporation of another State, may in that State, make a valid contract for interest at any rate permissible with the laws of that State, and may in this State bring suit and recover judgment according to the law of the State where its contract was made. The validity of contracts is determined by the *lex loci contracti*. The relief afforded for a breach of contract is in accordance with the law of the forum where suit for breach is brought.

The authorities cited by appellant, to the effect that calls can not be made until the entire stock has been subscribed, have no reference to cases in which the corporation, as in this case, is authorized to begin and carry on its contemplated business before the stock has all been taken. Where a company, for the purposes of its being, is to come into existence only upon the full amount of its stock being subscribed, it is manifest that it could not make and enforce payment of calls ere it had passed its embryonic condition. Such is not the condition of appellee. Buckley on Companies' Acts, 4th Ed. 19; Ornamental Pyrographic Co. v. Brown, 2 Hurl. & Colt. 63.

It is urged by appellant that it was incumbent on appellee to have its books actually present in court if it desired to show their contents; that it was not sufficient to, as was done, take by deposition the testimony of the secretary of the company and the custodian of its records at its office, the books being there produced, proven, and the entries desired to be introduced then and there copied and verified by the witness.

The entries, copies of which were introduced in evidence, were such as the company was by law required to keep; they were made when appellant was a stockholder, and therefore by his agents, and the copies were examined and sworn to by credible witnesses. See statutes of this State, Secs. 13 to 18, of chapter entitled Evidence; Greenl. on Ev., Vol. 1, Sec. 493, 13th Ed. see also Scarlett v. The Academy of Music, 43 Md. 203.

Snyder v. Swan Land and Cattle Co.

The making of the call for which suit was brought was proven by the testimony of witnesses as well as by copies of entries in the books of the company.

The making of a call is a fact which it is not indispensable should be proved by an introduction of or transcripts from the books of the company. *Hays & Black v. Pittsburgh & Steubenville R. R. Co.*, 38 Penn. St. 81-90; *Reynolds et al. v. Schweenfus*, 27 Ohio St. 311, 321, 324; *Ratcliff v. Teters*, 27 Ohio St. 66; *Tatmouth v. Koehler*, 33 Mich. 22; *Bank of the United States v. Dandridge*, 12 Wheat. 64.

The opinion in this case being applicable to *Frank v. Swan Land & Cattle Co.*, and *Friend v. Swan Land & Cattle Co.*, at this term, the judgment in each of said causes is affirmed.

MR. JUSTICE GARY.

If the question were now whether there was any good cause for suppressing any part of the depositions I should say that there was, but a motion made upon specific grounds is to be sustained or denied upon those.

The principal objection made to the depositions was that no secondary evidence of the contents of the corporation books was admissible, but the books themselves must be put in evidence on the trial. The 15th and 18th sections of chapter 51, Evidence and Depositions, permit copies to be used either certified or sworn, and whether the contents of the depositions were partly testimony of the witnesses as to corporate acts which should be proved by the books, or competent copies, is a question not necessary to consider.

Snyder, Admr., etc. v. The Swan Land and Cattle Co.

1. LIMITATIONS.—Sec. 70, Ch. 3, R. S., entitled "Administration of Estates," providing that all demands against the estate of a deceased person not exhibited within two years from the granting of letters, etc., shall be forever barred, etc., does not apply to contingent claims, where the right of action does not accrue before the settlement of the estate is closed.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

OTIS & GRAVES, attorneys for appellant.

SWIFT, CAMPBELL, JONES & MARTIN, attorneys for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This case is precisely like the four cases of Mandel, Harry L. Frank, Lewis E. Frank, and Friend, v. the same appellee (Nos. 4924, 4925, 4926 and 4927, this term), except the defendant in the court below, and appellant here, is in this case sued as the administrator of the estate of Louis Snydacker, deceased. The pleadings are identical with the pleadings in the Mandel case, except that in the case at bar the defendant below interposed the following additional plea:

“For a further plea in this behalf the defendant says, *actio non*, because he says that he was appointed as administrator of the estate of Louis Snydacker, deceased, by the Probate Court of Cook County, Illinois, on the 26th day of February, 1885; that he qualified as such administrator and accepted of said trust, and within six months thereafter gave notice, in the manner and form provided by law, for all persons having claims on said estate of Louis Snydacker, deceased, to attend at the term of said Probate Court within named, for the purpose of having the same adjusted; that on the 2d day of April, 1885, he duly filed an inventory and appraisal of all the estate of said Louis Snydacker, deceased, which was duly approved by the said Probate Court; that more than two years had elapsed since the grant of said letters of administration to him as aforesaid, prior to the commencement of this suit; and that the said plaintiff

Snydacker v. Swan Land and Cattle Co.

has not and did not, at any time within said two years, present to said Probate Court, or exhibit to this defendant, its said claim against said estate, or this defendant as administrator thereof; that the said plaintiff was not and is not under any of the disabilities named, specified and provided by statute in that behalf; and that thereby the said alleged claim of the said plaintiff in the said declaration mentioned, became and was absolutely and forever barred against this defendant as administrator, except as to the estate of the said Louis Snydacker, deceased, which has not been and was not inventoried and accounted for by this defendant as aforesaid; and this the defendant is ready to verify."

To this plea a demurrer was sustained in the court below and the judgment against the defendant, as administrator, was entered for \$453.26, the amount of the call and interest "payable in due course of administration," to which the appellant excepted.

For the facts and our conclusion upon the main question, we refer to and adopt for the purposes of this cause, the opinions in the cases mentioned.

In this opinion the question raised by the additional plea above set forth will alone be considered. The demurrer to the plea admitted the truth of the facts of the plea, which were well pleaded. More than two years elapsed from the date of the grant of letters of administration until the call sued on was made, and no claim upon said call was, or could have been, exhibited against said estate within the said two years. The cause of action was the call, and it did not accrue until more than two years after the issuance of letters testamentary. No right to make a call upon the estate of the deceased, alone and separately from other shareholders, existed, and the contingency for making a call upon all the shareholders had not arisen, until after the statute had run. It would lead to most confusing and absurd results to require the exhibition of contingent claims which might never ripen, against the estates of deceased shareholders in large corporations whenever they might die, and irrespective of whether their liability to respond

would ever arise. What was said by that able jurist, Judge Blodgett, in the case of Payson v. Haddock, 8 Bissell 293, may be adopted here with profit:

“The question which is presented by this demurrer raises the point as to whether a contingent claim which is not due, or can not be said to have accrued during the term of the administration of the estate of a deceased person, is to be barred by the operation of this statute. There are a large number of claims which we can imagine may arise against the estates of deceased persons, which can not be said to have accrued at the time the letters of administration are issued, or during the two years of the administration, such as actions of covenant for breaches of warranty made by the ancestor during his lifetime, and where the breach may not occur until long after the expiration of the limitation here provided for, and long after the settlement of the estate in the Probate Court; such, also, liabilities in favor of sureties upon bonds, where the liability of the surety is not fixed, perhaps, until long after the close of the estate in the Probate Court; and numerous cases of contingent liabilities may be imagined, where the party could not present a claim to the Probate Court or exhibit it to the administrator during the two years of limitation which is here provided for; and the question is, does this statute of limitations run as against that class of claims?

I have come to the conclusion, from examination of the authorities, that it can not be said to run as against any contingent claim, where the right of action has not accrued, and does not accrue, before the settlement of the estate is closed.”

In the same line of reasoning, our Supreme Court, in Dugger v. Oglesby, 99 Ill. 405, said:

“Another objection made to a recovery is, that the claim was not filed against the estate of Dugger within the two years after the grant of administration. Letters of administration were taken out in 1869, and the claim now sued on was never filed against the estate. The statute provision is that all demands against an estate, not exhibited to the

County Court within two years from the granting of letters of administration, shall be forever barred, except as to subsequently discovered estate not inventoried or accounted for by the executor or administrator. All the property, both real and personal, belonging to the estate, was inventoried by the administrator, so that there are no subsequently discovered assets. The eviction did not take place until in 1874. Thus the cause of action here did not in fact accrue until long, and more than two years, after the death of the ancestor, and the granting of letters of administration and the settlement of his estate. The cause of action here is not a demand which could have been exhibited to the court, proved or allowed against the estate of Dugger any time within two years after the granting of administration on his estate, it not accruing until afterward.

We are of opinion that the limitation of the statute does not apply to the case."

We refer also to *Suppiger v. Grauz*, 137 Ill. 216, and to *Thayer v. El Plomo Mining Co.*, 40 Ill. App. 344.

We think that, upon the weight of authority and of reason, the judgment of the Circuit Court was correct, and it will therefore be affirmed.

51	215
83	209

Lake Shore & M. S. Ry. Co. v. Dorata Rohlfs, Administratrix, etc.

1. CARE AND DILIGENCE—*Exercise of—Rejection of Evidence.*—In an action by an administrator against a railroad company for damages sustained by the death of an employe, it is error to reject evidence of the foreman of such company tending to show that the employe was not in the exercise of due care and diligence when the injury occurred.

2. EVIDENCE—*Under the Statute and at Common Law.*—Chapter 51 R. S., entitled "Evidence and Depositions," is a statute removing, not adding to, the disqualification of witnesses under the common law.

Memorandum.—Action for damages resulting by reason of a death from negligent acts. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at

the October term, 1893. Reversed and remanded. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

GARDNER & McFADON and PLINY B. SMITH, attorneys for appellant.

CASE, HOGAN & CASE, attorneys for appellee; F. A. MITCHELL, associate counsel.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Frederick Rohlfs was killed March 4, 1890, while at work for appellant in its Forty-third street yards, Chicago. He was a car repairer, and was at work making steam pipe connections between two baggage cars standing upon a side track used for making up passenger trains. It was while he was at work down between the two baggage cars that he was killed by the two cars being suddenly forced together by another car being "kicked" against them, at a moment when his head was between their coupling castings.

The appellee is his widow and administratrix.

From a judgment for \$5,000 recovered in her favor in the Circuit Court, this appeal is prosecuted.

One of the grounds for a reversal urged by appellant, is that the court excluded the testimony of one Kirby as to certain facts sought to be proved by him.

Kirby was general foreman of car repairs for appellant at the time Rohlfs was killed, and Rohlfs was under Kirby's direction and supervision.

Kirby was a witness for the appellant, and after testifying generally to his position and relationship to appellant and to Rohlfs, the following took place:

"Q. Had you prior to his (meaning Rohlfs) death given him any directions about the use of flags?

Objection by plaintiff because Mr. Rohlfs is dead; objection sustained, and exception by defendant.

Mr. McFadon: Now, that there may be no misunder-

standing, I want to offer to show that the witness, in his capacity as superior to the deceased, prior to the time of his injury, issued an order to the deceased and notified him direct and in person not to go under cars when trains were being made up without putting a flag at the head of the car in the direction from which the other cars were moving.

Offer objected to by plaintiff, because Frederick Rohlfs is dead, and the statute excludes proof of the conversation by witness. Objection sustained; defendant excepted.

Witness continuing, said: Prior to the time deceased was injured there was a custom or rule with reference to the use of flags in connection with the making up of a train. The custom was for a man going under cars to work to put up a flag to protect himself at the farthest end from where he was working, and where the cars or engine would approach him. * * * The rule was that all men should use a flag when they were in dangerous places working. Being under cars when trains were being made up would be considered dangerous.

Q. Had the deceased, Rohlfs, any knowledge of that rule?

Objection by plaintiff; sustained, and exception by defendant.

Q. Have you knowledge as to whether the deceased, Frederick Rohlfs, had knowledge of the custom and practice you have spoken of as obtaining to that yard?

Objection by plaintiff; sustained, and exception by defendant.

Defendant then offered to prove by his witness, that the deceased, Frederick Rohlfs, had knowledge of the custom and practice obtaining in that yard with reference to the use of flags and that this witness knew of his complying with that rule at times.

Objection by plaintiff; sustained by court as incompetent and exception by defendant.

Witness, continuing, said: Frederick Rohlfs to my knowledge did comply with the custom of putting up flags at times. I saw him myself.

Q. Did you have any conversation with him just prior

to his death about his being careless in not putting out flags when going under cars?

Objection by plaintiff; sustained and exception by defendant.

Court: I will sustain the objection to that question. The fact that he had a conversation at the time you can bring out if you want to, but I will not allow you to bring out the conversation.

Exception to ruling, by defendant.

Q. Did you have any conversation with the deceased, prior to the time of his death, about not going under trains of cars without putting out flags when doing so?

Objection by plaintiff; sustained, and exception by defendants.

Defendant then offered to show by this witness that he did have such a conversation, and that witness had told the deceased he must not go under cars without putting out flags.

Objection by plaintiff; sustained, and exception by defendant. * * *

Witness continuing, said: Have seen the deceased under cars without putting out flags.

Q. Did you ever caution him at such times with reference to his danger?

Objection by plaintiff; sustained, and exception by defendant.

Q. You were his superior? A. I was; yes, sir."

The foregoing quotations from the abstract of the bill of exceptions presents, fully and fairly, the question of whether it was competent to prove statements and orders made and given to Rohlf, he being now dead, by his foreman or superior, concerning the rule or custom of the yard, his knowledge of that rule or custom, and the danger of working under cars in disregard of that rule or custom.

It appears from the bill of exceptions that the objection to the excluded testimony was made and sustained on the theory that it was incompetent, either at common law or under the statute. If it were not incompetent at common

law, it was certainly not made so by the statute. The act of 1867, Secs. 1 to 8, Chap. 51, Rev. Stat. Ill., entitled "Evidence and Depositions," was a statute removing, not adding to, the disqualifications of witnesses. Whether Kirby, the foreman, would, or not, have been incompetent at common law, to testify upon the questions proposed, under the principles discussed in *Railroad Co. v. Welch*, 24 Ill. 33, he became competent by the act of 1867, though he were not so before. *I. C. R. R. Co. v. Weldon*, 52 Ill. 290; *Dunham T. & W. Co. v. Christensen*, 44 Ill. App. 523.

Kirby had no legal interest in the result of the suit. It can not be claimed from the evidence, that he was directly responsible for the accident, and he could not in any view we take of the case, have been liable over the appellant.

The case of *Witmer v. Rucker*, 71 Ill. 412, is not inconsistent with *R. R. Co. v. Weldon*, *supra*. There, the opinion of the court expressly states that Crissey, the rejected witness, was a co-defendant, and therefore he was plainly incompetent.

The offered testimony was very important and material. Although it was shown that a general rule or custom prevailed in the yards with reference to the use of flags upon cars under which work was being performed, as signals, or warnings, not to suddenly move such cars, it was a matter of first importance to the defense to be allowed to prove that Rohlf's knew of the rule or custom, and had been expressly cautioned by his superior in employment that he should always observe it, and that it was dangerous to omit it.

The same rule as to the exercise of reasonable care applies to cases where men are killed, as to where they are only injured.

In either case it is important to ascertain whether due care was exercised by the party suffering, and a material inquiry in that direction is as to what he knew of the circumstances surrounding him. The extent of his knowledge upon the subject can be determined, in case of his death, only by finding out what he had previously said, how he had

acted, and what had been said to him. Whether a man knows a thing or not, may frequently be determined by way of conclusion from other facts. Such knowledge may be inferred from evidence of his practices, and of statements made by him or made to him.

If a child was to repeat the multiplication table it would not be necessary for him to say he knew it. The fact that he knew the table would conclusively appear in the other fact that he had repeated it.

So, here, the fact of Rohlfs' knowledge of the rule or custom of the yards with reference to putting up flags might have been made out, to a *prima facie* extent at least, by evidence that he had been told of it and cautioned against the danger of omitting its observance.

Such evidence would not be of a narrative character, but would be as much in the nature of original evidence of the fact of his knowledge, as if, in case the rule had been printed and posted in the yards, evidence had been offered that he had been seen to read it.

The offered evidence should have been admitted in aid of the inquiry as to what was his knowledge of the rule, or the danger of working without putting out a flag.

There are various other considerations urged upon us as to why the judgment should be reversed, pertaining most noticeably to the instructions given the jury, and should be commented upon to a partial extent, even though, if either one stood alone, a reversal because thereof, might not necessarily follow.

In the eleventh instruction offered by the appellant, the court inserted the words, "and the other instructions of the court" so as to cause the instruction, as given, to read: "If you believe from the evidence and the other instructions of the court, that the said servants," etc., then, etc.

Juries are to form their belief as to facts from evidence alone.

Especial fault is also found with the giving, unmodified, of the twelfth of appellee's instructions.

The instruction, as given, was:

“The jury are instructed, that if they find for the plaintiff, they may assess the damages at such a sum as will be a fair compensation, with reference to the pecuniary injuries resulting from such death, to the widow and next of kin of Frederick Rohlfz, not exceeding the sum of five thousand dollars.”

It will be observed there was a total absence of reference in the instruction to the evidence as a basis for the jury to act upon.

It was of such an instruction, that the Supreme Court, in C., B. & Q. R. R. Co. v. Sykes, Admr., 96 Ill. 162, remarked:

“The instruction is inaccurate in telling the jury that if they found defendant guilty, they might assess plaintiff’s damages at some amount not exceeding \$5,000, the amount claimed in the declaration. This part of the instruction leaves the jury at liberty to find any amount not exceeding the amount claimed without the slightest reference to any proof of the amount of damages sustained. It amounted to an uncontrolled license to find any sum under the limit that they might choose, and as they have found to the full limit, it may be, and probably they did, exercise the liberty the instruction gave them without reference to the evidence on that question. In this class of cases, instructions should be accurate and precise in reference to the finding of damages. This may have misled, and probably did mislead the jury in assessing damages.”

The cause having to be remanded for a new trial, we will not follow the appellant through all of its objections, most of which may and probably will be avoided at another trial, further than to say that we think the declaration was sufficient, and cite in support thereof the recent case of Libby v. Scherman, 34 N. E. Rep. 801.

The judgment will be reversed and the cause remanded.

Huntington, Trustee, etc., v. Metzger.

1. ARREST—*In Civil Case*.—In order to justify a resort to arrest, all the provisions of law relating thereto must be fully complied with.

2. ARREST—*Refusal to Surrender Estate*.—Where the issue is upon the alleged refusal of the debtor to surrender his estate, the court may look to the proceedings by which the debtor was called upon to so surrender.

GARY, J., dissenting.

3. ARREST—*Capias ad Satisfaciendum Not a Writ of Right*.—The law does not make the issuing of a writ of *capias ad satisfaciendum* a right depending upon the will and action of the execution plaintiff; on the contrary, it contemplates that the sheriff and some judicial officer shall each be in some manner responsible for the existence of such writ.

4. ARREST—*Body Execution—Sheriff's Return on Property Execution*.—Under Sec. 62 of Chap. 77, R. S. Ill., providing that "if upon the return of an execution unsatisfied in whole or in part, the judgment creditor, or his agent or attorney, shall make an affidavit," etc., a writ of *capias ad satisfaciendum* may issue. The sheriff's return must be made upon his own responsibility, and not because of an order of the plaintiff.

Memorandum.—Insolvent debtor's act. Error to the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

ALDRICH, PAYNE & DEFREES, attorneys for plaintiff in error.

FRANCIS A. RIDDLE, attorney for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Defendant in error obtained, in the Circuit Court of Cook County, judgment against plaintiff in error for \$26,493.23; upon this, on the 12th day of June, 1893, execution was issued and placed in the hands of the sheriff of said county.

Upon this writ the sheriff made the following return:

51	222
56	271
51	222
158s	273
51	222
66	544
51	222
80	264
82	230

Huntington v. Metzger.

"I did, on the 23d day of June, 1893, demand of the within named defendant, William G. Metzger, that he pay this execution, or that he surrender sufficient of his estate, goods, chattels, lands and tenements for the satisfaction of this writ, and I also informed him that if he failed to comply with said demand, he would be liable to arrest upon an execution against his body, and he having failed to satisfy this writ, or any part thereof, and not being able to find any property in my county on which to levy this writ, I therefore return the same, no property found and no part satisfied at this 28th day of June, 1893.

JAMES H. GILBERT, Sheriff.

JOHN W. WESTERFIELD, Deputy."

Thereafter, the plaintiff, in pursuance of the provisions of Sec. 62 of Chap. 77 of the Revised Statutes, procured an order for the arrest of the defendant, who, upon being taken into custody, applied to the County Court of said county for a discharge under the provisions of chapter 72 of the Revised Statutes, entitled "Insolvent Debtors." The issue there made was whether he had refused to surrender his estate for the payment of said judgment.

A good deal of testimony was taken and evidence heard upon this issue, the County Court finally ordering the prisoner's discharge, from which order this appeal is prosecuted.

The statute authorizing the filing of creditors' bills is in part as follows:

"Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant," etc.

Under this statute this court held, in *Sheubert v. Honel et al.*, 50 Ill. App. 597, that a creditor's bill could not be maintained when it appeared that the return of the writ unsatisfied was made by order of the plaintiff in the execution, and this court there said: "The return must be the act of the sheriff, on his own responsibility, and not by direction of the plaintiff."

In *Durand & Co. v. Gray et al.*, 129 Ill. 9, the Supreme Court say that to authorize the filing of a creditor's bill, based upon an unsatisfied judgment, it must appear that an execution has been issued and that it has been returned by the proper officer unsatisfied by reason of his inability to find property whereon to levy.

The statute, by virtue of which writs of *capias ad satisfaciendum* are issued, Sec. 62, Chap. 77, is in part as follows: "If, upon the return of an execution unsatisfied in whole or in part, the judgment creditor, or his agent or attorney, shall make an affidavit," etc.

The two statutes as to the provisions for the return of an execution unsatisfied are almost identical, and what is required in this regard in one case must be in the other.

Upon the trial in the County Court, it appeared that the attorneys of the plaintiff in the said judgment gave to the sheriff who had the writ of *feri facias* the following order:

"Huntington v. Metzger, Circuit Court. The sheriff will return the execution in the above entitled cause, no property found and no part satisfied.

July 28, 1893.

ALDRICH, PAYNE & DEFREES."

The return of the sheriff was made upon the same day.

The constitution of this State provides, Sec. 12, Art. 2, that "no person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud."

The courts have uniformly held that in order to justify a resort to arrest, all the provisions of law relating thereto must be fully complied with. *Maher v. Huette*, 10 Ill. App. 56.

While it is true that in the case under consideration the issue joined was upon the alleged refusal of the debtor to surrender his estate, yet we think that upon such issue the court may look at the proceedings by which the debtor was called upon to so surrender.

What passed between the sheriff and appellee when the

Huntington v. Metzger.

demand was made, we do not know, other than that the defendant failed to satisfy the writ or any part thereof. We are not prepared to hold that the sheriff, having made demand, and the debtor having failed to satisfy the writ or any part thereof, the execution plaintiff may at once direct and have a return of the writ, no part satisfied and no property found, and thereupon, upon filing the statutory affidavit, becomes entitled to an order of arrest.

The law does not make the issuing of a writ of *capias ad satisfaciendum* a right depending upon the will and action of the execution plaintiff; on the contrary, it contemplates that the sheriff and some judicial officer shall each be in some manner responsible for the existence of such writ. The sheriff's return must be made upon his own responsibility, and not because of an order of the plaintiff, just as the judge or master acts upon his responsibility in ordering the issuance of an execution against the body.

The order of the County Court is therefore affirmed.

MR. JUSTICE GARY.

I dissent from the opinion of the majority of the court.

In my judgment the County Court had no concern with any question whether the *ca. sa.* was providently or improvidently issued, but only whether in fact the appellee had or had not refused to surrender his property. The County Court does not sit in review of the act of whatever officer ordered the issuance of the *ca. sa.*

On the question made by the appellee that an appeal from the County Court should have been to the Circuit Court and not to this court, I speak for the whole court, and refer to *Union Trust Co. v. Trumbull*, 137 Ill. 146, and *Lee v. People*, 140 Ill. 536, as affirming the jurisdiction of this court.

Barker v. Turnbull.

1. **SALES—Opportunity to Inspect the Property.**—Where there is an agreement that the vendee shall inspect the property agreed to be sold, and pay for it upon such inspection, and he does in fact inspect it or has a reasonable opportunity so to do, and there is no fraud on the part of the vendor in reference to the inspection, and no warranty of the subject of sale, intended to survive the acceptance, the verdict is concluded by his inspection.

2. **SALES—No Opportunity for Inspection.**—In sales of property where there is no inspection or no fair opportunity for inspection, the purchaser will be entitled to recoup his damages in a suit for the price, even though he may have received the property, if it is proven to be inferior in quality to such as were contracted for.

3. **SALES—Acceptance After an Opportunity to Inspect.**—Where there has been an acceptance after an opportunity to inspect the goods delivered under an executory contract, damages because of the inferior quality of the accepted goods can not be recouped in the absence of proof of fraud, or express warranty by the vendor, or of latent defects incapable of discovery or inspection.

4. **RECOUPMENT—Elements of the Doctrine.**—It is an indispensable element in the doctrine of recoupment, that the demand sued for and that to be recouped shall arise out of the same subject-matter; in other words, it must appear that the express or implied promise broken by the plaintiff was the consideration for the defendant's promise.

5. **INTEREST—Unreasonable and Vexatious Delay of Payment.**—By the terms of a contract of sale of personal property, payment was to be made upon delivery on board a vessel bound for Chicago, but not having been made, the vendor drew a draft for the amount ascertained by the contract price upon the vendee, which was returned dishonored. Upon the facts the jury were warranted in finding there had been an unreasonable and vexatious delay in payment, which justified the allowance of interest.

Memorandum.—Assumpsit for goods sold. Appeal from the Circuit Court of Cook County: the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

SMITH, HELMER & MOULTON, and SCHUYLER & KREMER,
attorneys for appellant.

FLOWER, SMITH & MUSGRAVE, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

An action in assumpsit was brought by the appellee to recover for the purchase price of 12,633 first-class railroad ties, and 687 second-class ties, or culls, sold to the appellant in July, 1890.

The only plea was the general issue. Judgment was recovered for the full contract price, with interest added, as seems to be conceded by counsel on both sides, less a payment of \$2,000 made by appellant before suit.

It is not necessary to state the evidence upon which our conclusion rests, but we regard it as fairly established, that the contract between the parties was that the inspection of the ties should be made at the point in Michigan from which they were shipped, and that payment for them should be made when they were delivered on the rail of the vessel sent by the appellant to receive them.

Monaghan, through whom appellant made the contract with appellee, was clearly appellant's agent in that behalf.

One Joncas was sent by appellant to the point where the ties were to be loaded on the vessel to inspect the ties. He was a professional and competent inspector, and at the conclusion of his inspection gave to appellee a certificate of his inspection, stating the quantity and quality of the ties put on board the vessel, as of the number and quality before stated.

The appellee drew a draft on appellant for the amount ascertained by the contract price per tie, and attached the certificate of the inspector to the draft, and the draft was dishonored.

It is contended that because a subsequent inspection of the ties made after their arrival in Chicago, resulted differently from the inspection made by Joncas, and that because the inspection made by Joncas was hurried and imperfect, a less amount than was recovered should have been allowed appellee.

And complaint is made of the refusal of the court to in-

struct the jury, as asked by the defendant, that even if there was an actual inspection of the ties, yet if the ties were not merchantable, or were not of the quality or condition contemplated by the parties, or expressly or impliedly contracted for, the jury should allow to the defendant and deduct from the price of the ties all damages which they believed, from the evidence, the defendant had suffered on account of such defects in quality or condition of the ties.

The ties were inspected as they floated past the inspector, in a sluiceway used for such purposes, and the court of its own motion, gave to the jury an instruction that it was for them to decide from all the evidence in the case, whether the ties were actually inspected by the defendant's inspector where they were loaded, or whether there was a reasonable opportunity to inspect them there.

And the court also gave, at the instance of the defendant, the following instruction :

"The jury are instructed that if they believe from the evidence that the ties in question, by the terms of the contract of sale, were to be inspected by the defendant when they were loaded on board the vessel, and that the defendant sent an inspector to the plaintiff's dock for that purpose, and if you further believe from the evidence that it was impossible to inspect the ties, on account of the manner in which they were delivered to the vessel, the defendant was not barred by such attempt at inspection of the ties, but had a right to receive them, and if the ties, or any part of them, proved to be unmerchantable, or were not of the quality contemplated by the parties, the defendant might receive the ties and use them, or resell them, and would not be precluded from showing and setting up in this case any actual defect in quality or condition of the ties, and any damages to him by way of recoupment; and if you believe from the evidence in this case that it was impossible to inspect the ties, as aforesaid, and that the ties in question, or any part of them, were unsound, unmerchantable, or were not of the quality or condition contemplated by the parties, you should allow or recoup to the defendant, all damages proved, if any, on account of any defects in quality or condition."

The instruction so given at the request of the defendant was fully as liberal in favor of the defendant as he was entitled to, and we quote it to show that fact, and not because we approve the full limit to which the instruction went as an exposition of the law of the case.

The refused instruction asked by the defendant, was properly refused by the court. It did not correctly state the law in case of an actual inspection.

Where there is an agreement, as in this case, that the vendee shall inspect the property agreed to be sold, and pay for it upon such inspection, and he does in fact inspect it, or has a reasonable opportunity so to do, and there is no fraud on the part of the vendor in reference to the inspection, and no warranty of the subject of sale, intended to survive the acceptance, the vendee is concluded by his inspection. Had there been no inspection, or no fair opportunity to inspect the ties, there would be no question but that the appellant would have been entitled to recoup, even though he had received the ties, if they were proved to be inferior in quality to such as were contracted for. But the jury has rightly, as we read the evidence, found that an inspection was had, or at least that a fair opportunity to inspect was afforded. Whatever loss, if any, the appellant has suffered because of an imperfect inspection, was the result of a neglect of opportunity and duty by his inspector Joncas. Every reasonable opportunity was given him to make a thorough inspection, and if Joncas neglected it, either because of the rapid coming along of the ties, a matter wholly within his control, or because the master of the vessel, another agent of the appellant, was urging a more rapid loading of his vessel, the appellant is in no condition to complain.

This court held in *Eureka Cast Steel Co. v. Morden Frog Works*, 23 Ill. App. 591, that in the absence of fraud or latent defects, the acceptance of an article sold upon an executory contract after an opportunity to examine it, amounted to an agreement that the article conformed to the contract and was satisfactory, and barred all claim for compensation for defects existing in the article. Where there has been an acceptance after an opportunity to inspect the

goods delivered under an executory contract, damages because of the inferior quality of the accepted goods can not be recouped in the absence of proof of fraud, or express warranty by the vendor, or of latent defects incapable of discovery or inspection. *Tilley v. Enterprise Stone Co.*, 127 Ill. 457; *Norton v. Dreyfuss*, 106 N. Y. 90.

There is no merit in the objection that the court rejected the testimony of certain witnesses called by defendant to prove that ties could not be properly inspected while floating down a sluiceway. The question as to whether a reasonable opportunity was afforded for the inspection was one for the jury to determine from the evidence of the actual conditions under which the inspection was made, and not for experts to decide, and was before the jury upon the facts proved and a proper instruction given by the court.

Appellant further contends that it was error for the court to refuse to allow him to show the amount of demurrage he paid to the vessel owner because of unnecessary detention by appellee of the vessel sent for the ties. The court gave permission to appellant to prove any damage occasioned to him by delay in delivering to appellant the property which was the subject-matter of the contract, but refused to permit him to show the amount paid the vessel owner for demurrage, and instructed the jury, at the request of appellee, that

"Under the evidence and pleadings in this case, the defendant is not entitled to recoup or set off damages for delay, if any, arising out of any contract express or implied, between the defendant and the owner of the vessel *May Durr*."

Such ruling and instruction were clearly right. Appellee had nothing to do with the contract between appellant and the vessel owner. If appellant paid damages under such contract with a third person, certainly such damages could not be recouped against appellee.

"It is an indispensable element in the doctrine of recoupment, that the demand sued for and that recouped, shall arise out of the same subject-matter, * * * in other

Elgin Butter Co. v. Elgin Creamery Co.

words, it must appear that the express or implied promise, broken by the plaintiff, was the consideration for the defendant's promise." *Keegan v. Kinnare*, 123 Ill. 280; *Popper v. Meager*, 33 Ill. App. 19; *Hartshorn v. Kinsman*, 16 Ill. App. 555.

The only remaining question is as to whether interest was allowable on appellee's demand.

It seems to be conceded on both sides, that one hundred and fifty dollars for interest, was included in the verdict of the jury, and no point is made, that, if interest is recoverable, that sum exceeds the proper amount.

We are not disposed to state as a proposition of law, that the mere fact that the appellant conducted himself in the manner disclosed by the record, with reference to payment of the appellee's demand against him, would constitute "an unreasonable and vexatious delay of payment" within the meaning of Sec. 2, Chap. 74, Rev. Stat., entitled interest.

But in view of the fact that according to the terms of the contract the money was payable when the ties were delivered on board the vessel, we do not feel warranted in overturning the verdict of the jury, based, as it must necessarily have been, upon their finding that the pretenses resorted to by the appellant after the ties had arrived in Chicago, constituted an unreasonable and vexatious delay of payment and justified the allowance of interest.

Upon the whole record, we think the judgment of the Circuit Court must be affirmed.

51	231
155*	127

Elgin Butter Co. v. Elgin Creamery Co. et al.

1. **TRADE NAMES**—*Names of Places, etc.*—The name of a place can not be appropriated as a trade name by one person to the exclusion of others.

Memorandum.—Bill for injunction. Error to the Superior Court of Cook County: the Hon. KIRK HAWES, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

FRANK CROSBY and ELBERT H. GARY, attorneys for plaintiff in error.

LYMAN & JACKSON, attorneys for defendants in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiff was incorporated in 1882, and the defendant above named in 1891, both in this State, and by the name above written.

The only relief which the abstract and plaintiff's briefs show that the plaintiff desires, is, that the defendant be enjoined from doing a butter business under the name of Elgin Creamery Company. Our duty does not require us to look beyond that abstract and those briefs to ascertain the plaintiff's rights. *C. P. & St. L. Ry. v. Wolf*, 137 Ill. 360; *City of Mt. Carmel v. Howell*, *Ibid.* 91.

From that abstract it appears that the only butter factory in the city of Elgin is the plaintiff's, and that in the township, which includes the city, the plaintiff's factory is the only one known by the name of Elgin Creamery.

A township—nothing being shown to the contrary—is, presumably, six miles square. Sec. 6, Ch. 139, Township Organization. The city within it can be no larger..

It is quite consistent with the bill that the defendant corporation may have a butter factory miles nearer to the post office and business center of Elgin than the plaintiff's, notwithstanding the allegation that the defendant corporation has no office in Elgin, unless the pockets of one of the other defendants are to be considered such office, and that its only office is in Chicago. The broad claim of the plaintiff, therefore, is that no other corporation shall, however near its factory to the limits of the township, conduct a butter business, in a corporate name indicating the nature of its business, of which name Elgin shall be a part. In effect the plaintiff claims an exclusive right to the name of Elgin in

Standard Fashion Co. v. Blake.

connection with the butter business, unless, at least, if used by another corporation, that corporation has its factory actually within the township.

That is too broad a claim. Without inquiry whether the plaintiff might not be entitled to some kind of relief, having no aid of counsel in such inquiry, we hold that the demurrer to the bill was rightly sustained, upon the principle stated in *Candee v. Deere*, 54 Ill. 439, and *Bolander v. Peterson*, 136 Ill. 215, S. C., 35 Ill. App. 551, that the name of a place can not be, by one to the exclusion of others, appropriated as a trade name.

The decree dismissing the bill is affirmed.

Standard Fashion Co. v. Blake.

51	233
51	376

1. LABORER AND SERVANT—*Who is Not.*—A traveling salesman is not a laborer or servant within the meaning of the statute approved June 1, 1889, providing for attorney's fees when a mechanic, artisan, miner, laborer or servant sues for wages.

Memorandum.—Assumpsit for work, labor, etc. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 8, 1894.

The statement of facts is contained in the opinion of the court.

BOOTH & BOOTH, attorneys for appellant.

SMITH, HELMER & MOULTON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was a traveling salesman in the service of the appellant, and this action is for a balance that he claims to be due him.

The jury gave him a verdict of \$65.51, and the court gave

him a judgment for the dollars, without the cents, and added to the dollars fifteen other dollars.

This addition the appellee tries to justify under the act providing for attorney's fees when mechanic, artisan, miner, laborer or servant sues for wages, approved June 1, 1889, printed at the end of chapter 13 of statute by Hurd.

The appellant seems not to be aware (and if the appellee is he won't tell) that as long ago as the 25th day of November, 1885, this court decided that a traveling salesman was not a laborer or servant within the meaning of the then statute, and repeated the same construction on the 4th day of May, 1892, under the present statute. *Epps v. Epps*, 17 Ill. App. 196; *Epstein v. Webb*, 44 Ill. App. 341.

That he is not a mechanic, artisan or miner, needs no illustration.

Without commenting on the evidence, we think that if the appellee within two days after this opinion is filed will remit all in excess of \$40 we will affirm for that sum; otherwise reverse and remand. In either case the costs fall on the appellee. *K. & S. R. R. Co. v. Horan*, 30 Ill. App. 552.

Harms v. Stier.

1. *REMEDIES—Election Among Alternative Remedies.*—Election among alternative, or as they are usually called, concurrent remedies, which once made is irrevocable, has place under a great variety of circumstances. The most frequent in practice is where a party having a right to rescind a contract, and having knowledge of the facts which give him the right to rescind, brings an action upon the contract, thereby ratifying it. He can not thereafter rescind.

2. *REMEDIES—Irrevocable Election.*—Another class of cases of irrevocable election is where a party has obtained property the possession of which is the subject of controversy, by legal proceedings. In such case he must find his remedy by an adjudication in those proceedings, and can not thereafter resort to some alternative remedy.

3. *REMEDIES—Election Among Inconsistent.*—Where there exists an election between inconsistent remedies, a party is confined to the remedy which he first adopts. When remedies are not concurrent, a choice between them once made, the right to follow the other is gone.

Harms v. Stier.

4. **REMEDIES—Election Among—The General Rule.**—Where the owner of personal property has been deprived of it by the wrongful acts of a stranger, amounting to a conversion of it, two courses are open to him. He may sue in conversion, to recover the value of the property, or in replevin, to recover the property itself, and damages for its withholding. But he can not simultaneously pursue both remedies. To allow him so to do would be to enable him to recover both the property and its value.

5. **CONCURRENT REMEDIES—Trespass and Replevin.**—For the taking of personal property the owner had his election to sue in replevin, or in trespass, for his property in species in the one, or damages in the other. But having got his property in replevin, his cause of action in trespass is gone.

6. **REMEDIES—Personal Action Suspended.**—A personal action once suspended by the act of the party, is forever gone.

Memorandum.—Trespass to personal property. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1893, and reversed. Opinion filed January 11, 1894. Opinion on rehearing filed April 9, 1894.

The statement of facts is contained in the opinion of the court.

ELBERT H. GARY, attorney for appellant.

H. S. MECARTNEY, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued and recovered in trespass for taking his horses. He had, before this suit, replevied the horses, but that suit was dismissed on motion of this appellant for want of a declaration. The appellee put into this case the evidence of the replevin suit.

The appellee had his election to sue in replevin, or in trespass, for his horses in the one, or damages in the other; and having got his horses in the replevin suit his cause of action in trespass was gone. 6 Am. & Eng. Ency. of Law, 350.

And the appellee having himself put in the evidence, any plea by the appellant setting up the defense was unnecessary. *Savage v. French*, 13 Ill. App. 17.

It does not alter the case if the appellant did (a matter disputed) regain the horses on a *retorno habendo*. The replevin

suit suspended all other remedy. "A personal action once suspended by the act of the party, is gone forever." Wankford v. Wankford, Salk. 392; Lord North v. Butts, Dyer, 139 b.

Contrary to this view of the law the court instructed the jury that, "If, from the other evidence, you shall find the defendant guilty, then the court instructs you that the fact that plaintiff brought his action of replevin and obtained the horses on the writ, and that afterward said replevin suit was dismissed and a writ of *retorno habendo* ordered and issued in said cause and said horses taken from the plaintiff on said writ of *retorno habendo*, is not a bar to this action."

It is unnecessary to notice any other question in the case. It is not in our province to advise the appellee whether he has any, and if any, what remedy.

The judgment is reversed, and a finding of facts as a reason for not remanding will be entered here.

MR. JUSTICE GARY, OPINION ON REHEARING.

Election among alternative, or as they are usually called, concurrent remedies, which once made, is irrevocable, has place under a great variety of circumstances.

The most frequent in practice is where a party having a right to rescind a contract, and having knowledge of the facts which give him the right to rescind, brings an action upon the contract, thereby ratifying it, he can not thereafter rescind, and *vice versa*.

In Flower v. Brumbach, 131 Ill. 646, same case with title reversed, 20 Ill. App. 219, this doctrine is recognized, but the case held not to be within it, as both the pending and the former action were upon the hypothesis that Brumbach had sold and delivered goods to Flower, which by the sale became and remained the property of Flower.

In Gibbs v. Jones, 46 Ill. 319, both actions were upon the hypothesis that the defendant never acquired any right to the mules in controversy; and both actions were for compensation.

But another class of cases of irrevocable election is where by aid of proceedings at law the party has obtained the prop-

Harms v. Stier.

erty which is the subject of controversy—taken it into his own custody—and in such case he must find his remedy by an adjudication in those proceedings, and can not thereafter resort to some alternative remedy.

Such a case is *Rodermund v. Clark*, 46 N. Y. 354. There Clark and Ward were each half-owners of a sloop, of which Ward was in possession as captain. Clark sold the whole sloop, and his vendee, by an action in New York, equivalent to our action of replevin, took the sloop from Ward, and Ward, by a statutory proceeding in the same action, regained possession *pendente lite*. It was held that his remedy was to persist in his defense to that action, and that he could not thereafter—although the sloop was again taken from him by the vendee, by proceedings in admiralty—sue Clark for a conversion of Ward's half of the sloop by selling the whole.

Howeth v. Mills, 19 Texas, 295, is exactly parallel to this case. An execution in favor of Mills and against Walton was levied upon goods claimed by Howeth; as in this case a distress warrant against the brother of Stier was executed by taking the horses which he claims.

Howeth, by a proceeding under the statute of Texas—giving a bond to try the right of property—took the goods from the possession of the sheriff, as Stier here, by replevin, took the horses from the possession of the constable who executed the distress warrant.

The court said Howeth “had elected his remedy and must abide by it,” and therefore could not maintain an action against the plaintiff in the execution for damages for the trespass in causing the levy.

I do not cite *Morris v. Rexford*, 18 N. Y. 552, as authority in this case, as, though the plaintiff there first brought replevin, yet the real election there was to rescind or affirm a sale; not between remedies.

“Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. * * * The remedies are not concurrent, and where the choice between them is once made,

the right to follow the other is forever gone." *Boots v. Ferguson*, 46 Hun, 129.

To take the horses on replevin and be paid for them in trespass, are not concurrent, but inconsistent, remedies.

In *Maumann v. Jefferson*, 23 N. Y. Sup. 685, is a list of many cases as authority for the position that "Where the owner of personal property has been deprived of it by the wrongful acts of a stranger, amounting to a conversion of it, two courses are open to him:

"He may sue in conversion, to recover the value of the property, or in replevin, to recover the property itself, and damages for its withholding. But he can not simultaneously pursue both remedies, for to allow him so to do would be to enable him to recover both the property and its value.

"Accordingly it has been held in such cases, as in all others where two or more inconsistent remedies are open to an aggrieved party, that by commencing an action upon one, he makes his election to surrender the others."

In *Hartland v. Hackett*, 57 Vt. 92, though the counsel there, as here, had not touched the question of election of remedies, but only whether the other suit had resulted in satisfaction, the court declined to consider that point, and decided the case upon the doctrine that "when a person has two or more remedies for the same wrong, his election and actual prosecution of one is a bar to the others." And see *Dyckman v. Sevatson*, 39 Minn. 132.

Whether we would hold that the mere commencing an action of replevin in which nothing further was done, was an election which barred trespass for the same taking, is not now a question. It is common sense that when the writ of replevin has been executed and the property delivered to the owner, he can not, while he has it under process of law, maintain trespass; and if his right to maintain trespass is suspended, it is gone, as said in the original opinion on the authority there cited, to which we add *Ford v. Beach*, 11 Ad. & El. N. S., 63, E. C. L., 852-867.

Or, using the phrase of Comyn's Digest, "if a man once determines his election it shall be determined forever;"

quoted in *Moller v. Tuska*, 87 N. Y. 166. But it may well be questioned whether his election is determined where there is no question of ratification or rescission until he has done something that affects somebody. Judgment reversed.

Carey-Lombard Lumber Co. v. Chicago Title & Trust Co.

1. PARTNERSHIP—*Admissions of Members, etc.*—*Effect of.*—The admission of a party that he is a member of a partnership, may render him liable to creditors who have trusted the partnership upon such admission, but it does not necessarily make the party a member of the firm as between him and the other parties.

Memorandum.—Proceedings under the act pertaining to voluntary assignments. Appeal from the County Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

ISRAEL COWEN, attorney for appellant.

JOHN C. TRAINOR, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

W. H. Rolff & Co. made an assignment to the appellee for the benefit of creditors, and the assets are being administered under the direction of the County Court. The appellant having a judgment and execution against the firm, which it is alleged consisted of Rolff and his wife, applied to the County Court to direct the assignee to surrender the assigned property to the sheriff, that it might be applied to the satisfaction of the execution.

The assignment was executed by W. H. Rolff only, as assignor, and the question of fact is whether his wife was his partner. On that, the appellant introduced the testimony of several witnesses that both Rolff and his wife had said they were partners, and also proof that she had acted

in the business, but none that in fact she had any capital in it. For the appellee, Rolff, his wife, and his brother and bookkeeper, Henry Rolff, testified that she had no interest in the firm, that there was no partner, the company being only show, and that she only made collections, except on that one occasion when Rolff was disabled by an accident, she did order goods.

On this evidence the decision of the County Court that she was not a partner must stand. The question is not whether she had, by holding herself out as a partner, given to creditors, who trusted to appearances, the right to hold her as a partner, but whether as between themselves the property of the nominal firm was the property of the husband and wife, or of the husband alone. If it was his only, he could assign it as he did. *Whitworth v. Patterson*, 6 Lea (Tenn.) 119.

The question of law whether one partner may assign the firm property for the benefit of creditors does not arise on this record. Affirmed.

Buxbaum & Co. v. Dunham, for the use of Kauffman.

1. *LEASE—Assignment—Transfer of an Equitable Right to Rent.*—An assignment and delivery of a lease to a party transfers to him the equitable right to the rent.

2. *GARNISHMENT—Rent to Accrue—Equitable Assignment.*—Where an assignment of a lease by the lessor is made before the rent becomes due, it will take effect as to such rent when it does accrue, and garnishee proceedings against the tenant, served previous to the assignment, will not affect it.

Memorandum.—Garnishment. Appeal from the Superior Court of Cook County. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

GEORGE W. PLUMMER, attorney for appellants.

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66	664
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51	240
73	318

CHARLES ALLING, JR., attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

John W. Kauffman, for whose use this action was instituted, recovered judgment at the June term, 1893, against the above named appellee.

By subsequent proceedings garnishee process sued out by Kauffman was served June 22, 1893, upon the Oakland Club, which is a tenant of Dunham, under a lease to expire May 1, 1896, the rent payable in advance on the first day of each month.

The appellants claim the rent by a petition, which, after showing a consideration of an indebtedness to be secured, alleges that "the said Dunham did on the 27th day of June, 1893, assign and deliver to" them the lease. We understand by this that on the lease some sort of indorsement purporting to assign the lease was made.

Now, while the lessor has no estate under a lease — only the rent—yet such an indorsement does transfer the equitable right to that. *Chapman v. McGew*, 20 Ill. 101; *Dixon v. Buell*, 21 Ill. 202.

Kauffman recovered a judgment against Dunham, June 5, 1893. An execution was issued and duly returned "no property found."

Kauffman then filed an affidavit as is required by the statute in cases of garnishment after judgment, and garnishee summons was issued and served on the Oakland Club as garnishee on June 22, 1893.

Five days after such service, on June 27, 1893, Dunham, the judgment debtor, assigned to Buxbaum & Co. his interest in a lease which he owned as lessor of the premises occupied by the Oakland Club as his lessee. Buxbaum & Co. served a notice on the Oakland Club that the lease had been assigned to them, and that it would be terminated unless the rent for July was paid to them on or before July 31st.

To avoid the possibility of a termination of its lease, the Oakland Club filed its petition on July 29, 1893, stating that it had been served with process as garnishee, for the

use of Kauffman, on June 22d, and could not, therefore, pay said rent to Buxbaum & Co. until its liability as garnishee for the use of Kauffman could be determined.

The Oakland Club was allowed, on July 31, 1893, to deposit the July rent with the clerk of the court, subject to the determination of the rights of the claimants to it.

On the next day, August 1, 1893, Buxbaum & Co., who had been summoned to appear in the case, filed their petition averring the assignment of the lease to them by Dunham, the judgment debtor, and asking that the July rent which had been paid into court, be paid to them.

Interrogatories to the garnishee were filed on August 4, 1893, and the answers to them by the Oakland Club were filed August 9, 1893.

On August 28, 1893, the cause came on for hearing upon the demurrer which had been filed by Kauffman to the petition of Buxbaum & Co., upon the answer of the Oakland Club as garnishee, and upon the motion of John W. Kauffman for the appointment of a receiver.

The demurrer was sustained, and the petition of Buxbaum & Co., which asked that the rent for July be paid to it, was dismissed. They appealed.

An equitable right takes precedence of a subsequent garnishment. *Gregg v. Savage*, No. 4914, this term.

But here the garnishment was first.

The real question of permanent interest on this record, is whether rent to accrue is a subject of garnishment. The difficulty in the way is not that the rent is not due. The 19th section of the garnishment act provides for that in staying execution until twenty days after the debt garnished is due.

But the rent has not been earned. It will belong, unless otherwise disposed of or prevented, to the owner of the reversion when it becomes due.

Some provision of the lease—eviction under title paramount, or other cause may prevent the landlord ever having any interest in it.

It follows, that until the rent was earned there was noth-

Watts v. Howard & Calkins.

ing for the garnishee process to operate upon, and when it was earned and became an indebtedness to the landlord, it no longer was his. If it had remained his until it was due, the garnishment would have been effectual. If a judgment were entered under the 19th section, and the term passed before any rent became due, and then under the provisions of the lease, or by eviction, the rent stopped before it accrued, how could the tenant escape the judgment?

But the landlord has such a probability that rent may accrue as enables him to make an equitable assignment of it which will take effect if, and when it does accrue. *Gregg v. Savage*, No. 4914, this term.

As, in this case, such assignment was made before there was anything for the garnishee process to operate upon, the judgment of the Superior Court on demurrer dismissing the petition of the appellant was wrong, and it is therefore reversed and the cause remanded.

Omitting to aver that the indebtedness secured by the assignment had not been paid was no defect in the petition.
1. Chit. Pl., 243, *et seq.*

**Watts v. Howard & Calkins, Co-partners, for the use,
etc.**

1. **REAL ESTATE BROKER—Time to Sell—End of Authority.**—There must be a period within which, after a party introduced by a real estate broker has declined to purchase, the owner or another broker may treat the negotiation as at an end.

2. **REAL ESTATE BROKER—When Entitled to His Compensation.**—A broker earns his commission if his act, however slight, brings about a sale, but if his act fails to accomplish anything, he is not entitled to compensation.

3. **REAL ESTATE BROKER—Duty to His Principal.**—The obligation of a real estate broker requires that if he do anything, his efforts shall be directed toward making a sale upon the terms given. In endeavoring to persuade his principal to take less than the price at which he has authorized a sale, he is not so much serving his employer as a would-be purchaser.

THE STATE OF TEXAS,

County of _____

IN THE DISTRICT COURT OF THE COUNTY OF _____

vs.

Appellant's Brief, G. W. STANFORD, ATTORNEY.

Where the efforts by the broker do not effect a sale, and after the proposed purchaser has decided not to buy, other parties induce him to buy, the broker will not be entitled to commissions. *Earl v. Cummins*, 54 Pa. St. 394; *Doonan v. Ives*, 73 Ga. 295; *Wylie v. Marine Nat. Bk.*, 61 N. Y. 416.

Appellant's Brief, G. W. STANFORD, ATTORNEY.

Where the efforts by the broker do not effect a sale, and after the proposed purchaser has decided not to buy, other parties induce him to buy, the broker will not be entitled to commissions. *Earl v. Cummins*, 54 Pa. St. 394; *Doonan v. Ives*, 73 Ga. 295; *Wylie v. Marine Nat. Bk.*, 61 N. Y. 416.

APPELLANT'S BRIEF, G. W. STANFORD, ATTORNEY.

Where the efforts by the broker do not effect a sale, and after the proposed purchaser has decided not to buy, other parties induce him to buy, the broker will not be entitled to commissions. *Earl v. Cummins*, 54 Pa. St. 394; *Doonan v. Ives*, 73 Ga. 295; *Wylie v. Marine Nat. Bk.*, 61 N. Y. 416.

Watts v. Howard & Calkins.

Where a broker employed to sell real estate called the attention of a customer to it and negotiated for the sale, but did not succeed in coming to terms, and two or three months after the negotiations were broken off, a friend, without the interference of the broker, bought the property, the broker was not entitled to commissions. *Armstrong v. Wann*, 29 Minn. 126.

Where a broker opens negotiations for sale, but fails to complete and abandons them, and the owner afterward sells the property to the same customer, the broker can not claim commissions. *Lipe v. Ludwick*, 14 Ill. App. 372; *White v. Twichins*, 26 Hun (N. Y.) 503.

APPELLEE'S BRIEF, WINTERS & JACKSON, ATTORNEYS.

If the owner does not wish the services of the broker any longer he should give him notice.

Appellant having engaged the services of appellees, should, if he desired to dispense with their services, have given them notice. *Bash v. Hill*, 62 Ill. 216.

If the owner sell the land, still, if the purchaser is procured by the efforts of the broker, he is entitled to his commission, even though the owner sell at a less price or upon different terms than given to the broker. *McConaughy v. Mahannah*, 28 Ill. App. 169; *Rees v. Spruance*, 45 Ill. 310; *Kuhn v. Grace*, 27 Ill. App. 427.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It clearly appears that the effort made by appellees to effect a sale of the property of appellant entirely failed. Appellees did call the attention of Mr. Johnson to the property, but he declined to purchase, and there is nothing tending to show that appellees had not ceased all effort to sell to him, long before his attention was again called to the property by reading an advertisement inserted by appellant.

It in no wise appears that appellant, in, after the lapse of some months, lowering his price and himself advertising his property, acted in any bad faith toward appellees, or sought thereby to take advantage of anything they had done.

The purchaser's attention was again attracted to the property, not by appellees, but by an action of appellant with which appellees had nothing to do.

There is nothing to show that Mr. Johnson would ever have again considered the purchase of this property but for the advertisement published by appellant, two months after Johnson had declined to buy.

Surely there must be a period within which, after a party introduced by an agent has declined to purchase, the owner or another broker may treat the negotiation as at an end, and entirely new and independent solicitation begin. *Mears v. Stone et al.*, 44 Ill. App. 44; *Carlson v. Nathan*, 43 Ill. App. 364; *Tombs v. Alexander*, 101 Mass. 255; *Earl v. Cummins*, 54 Penn. St. 394.

Appellees did not, by their efforts, accomplish anything; they seem not to have for several months done anything to bring about a sale; they sold out their business to a new firm and went out of the real estate business three months before appellant inserted his advertisement, and do not appear to have been in any way the procuring cause of, or instrumental in, bringing about the sale finally made. They did introduce Mr. Johnson to appellant, but from that introduction nothing came.

A broker earns his commission if his act, however slight, brings about a sale, but if his act fail to accomplish anything, he is not entitled to compensation. *Earl v. Cummins*, 54 Pa. St. 394; *Wylie v. Marine Nat. Bank*, 61 N. Y. 416; *McCleave v. Paine*, 49 N. Y. 561; *Lipe v. Ludwick*, 14 Ill. App. 572; *Armstrong v. Wann*, 29 Minn. 126; *Sibbold v. Bethlehem Iron Co.*, 83 N. Y. 378.

Counsel for appellees say: "It is very seldom that property is sold for the price and upon the terms given to the broker. The owner rarely expects to sell for the price and upon the terms first given to the broker, and the broker knows this, and his efforts are directed toward getting an offer which will be satisfactory to the owner."

We do not understand such to be the duty of a broker employed to sell for a fixed price. His obligation to his

North Chicago St. R. R. Co. v. Martin.

principal requires that, if he do anything, his efforts shall be directed toward making a sale upon the terms given. In endeavoring to persuade his principal to take less than the price at which he has authorized a sale, he is not so much serving his employer as a would-be purchaser.

The judgment of the Circuit Court is reversed and the cause remanded.

North Chicago Street R. R. Co. v. Martin.

1. NEGLIGENCE—*Ordinary Care*.—A person not in the exercise of ordinary care can not recover for personal injuries.

Memorandum.—Action for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

KEEP & LOWDEN, attorneys for appellant.

C. W. DWIGHT, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The declaration in this case alleges that while the plaintiff, with all due care, was going across North Clark street, at the crossing of that street and Diversey Place, he was, by the negligence of the defendant in starting its car without ringing the bell, struck by a grip car operated by it and seriously injured. The evidence is that the plaintiff got off one of the defendant's cars at Sherman Place, and at about that place in crossing Clark street, was struck by one of the defendant's cars.

The plaintiff testified that he got on one of the defendant's cars at Dearborn street, went Northward to Sherman

Place, and then stepped off; that he looked a little north, and saw a south bound car standing still at a safe distance from him, as he thought; that he thought he had ample time to get across the street, and the next thing he knew he was struck and knocked senseless; that the south bound car was apparently 100 feet away; that he did not hear the bell ring.

This was substantially all of the evidence introduced by the plaintiff to show how the accident happened.

Four witnesses for the defendant testified that the plaintiff stepped off the car upon which he had ridden north, and was struck near to a vault, south of Sherman Place—from fifteen to twenty-five feet south of Sherman Place. The gripman of the car which struck the plaintiff testified that the plaintiff stepped from two to three feet from and in front of that car, and was struck at once.

Several witnesses testified that they did not hear the bell on the south bound car ring before that car started to cross Sherman Place.

A witness called by the plaintiff testified upon cross-examination that the plaintiff told him that he got off the car, and the first thing he knew he was tumbling along before the car; that the plaintiff had always told him that he did not know anything about how it all happened.

Seven persons, including the plaintiff, saw and described the occurrence. According to the testimony of six of these, the accident was the result of the inattention and carelessness of the plaintiff.

There was only inferentially any evidence, either that the bell of the south bound car was not rung, or that such failure to ring, if any there was, caused the accident; while the very great preponderance of the evidence is that the plaintiff was not in the exercise of ordinary care when attempting to cross the street in which he was struck.

The judgment of the Superior Court is reversed and the cause remanded.

Peterson v. Brabrook Tailoring Co.

1. PREFERENCES—*By Directors of an Incorporated Company.*—The directors of an insolvent corporation can not, by a judgment note or otherwise, procure the company to do anything which shall give a preference. Nor can they act as agents for or in the interest of any creditor in securing for him such preference.

2. CORPORATIONS—*Insolvency—Relation of Directors to Creditors.*—Where a corporation becomes insolvent, its directors become trustees for all the creditors, and their fiduciary relation will not allow them to aid a creditor to obtain an advantage over other creditors.

3. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*What is not.*—Where a corporation, being insolvent, gave to some of its creditors judgment notes upon which judgments were entered, executions issued and levied, it was held, that this action did not amount to a voluntary assignment under the statute relating to voluntary assignments by insolvent debtors.

Memorandum.—Bill for a receiver by a stockholder of an insolvent corporation. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, JAMES A. PETERSON, ATTORNEY.

When a debtor has formed a determination to voluntarily dispose of his whole estate, it is immaterial into how many parts the performance is broken, the law will regard all his acts having such object as one transaction. *Preston v. Spaulding*, 120 Ill. 208; *White v. Cotzhausen*, 129 U. S. 329.

An assignment is a transfer without compulsion by a debtor to an assignee in trust to apply the same to the payment of his debts and returning the surplus, if any, to the assignor. *Farwell v. Nilsson*, 24 N. E. Rep. 74; *Farwell v. Cohen*, 28 N. E. Rep. 35.

Where an insolvent debtor, quitting business, determines to yield dominion of his entire estate to a few creditors and transfer substantially all his property to a few creditors by way of preferences, such acts will be declared to constitute a

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51	249
54	619

voluntary assignment, and such preferences will be set aside as against the statute. *White v. Cotzhausen*, 129 U. S. 329.

APPELLEES' BRIEF, TENNEY, CHURCH & COFFEEN, ATTORNEYS.

A mere individual stockholder has no right of action in himself as against the appellees, and no right to obtrude himself into the management of the corporate affairs, except under circumstances having no existence in this case. *Cook on Stockholders*, Sec. 646; *Allen v. Curtis*, 26 Conn. 456; *Greaves v. Gouge*, 69 N. Y. 154; *Hawes v. Oakland*, 104 U. S. 450; *People v. Ames & Weigley*, Natl. Corp. Rep., Vol. 7, 167.

PARKER & HIGGINS, attorneys for appellees and intervening petitioners.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant, as a stockholder in, and a creditor of, the Brabrook Tailoring Company, filed a bill asking to have certain judgments by confession, against it, set aside; a receiver of its assets appointed, and the corporation dissolved; to this the Tailoring Co., its officers and directors, the parties who obtained the judgments, and the sheriff who had made levies based thereon, were made parties defendant.

The defendants appeared and answered, and certain other creditors of the company filed intervening petitions. Much testimony was taken; the court, finally, upon the hearing, dismissed the bill.

It is urged that this court reconsider the opinion given in *Gottlieb v. Miller*, 5 Nat. Corp. Rep. 527, General Number 4641, Illinois appeals, to the effect that an insolvent corporation may give a preference to a creditor. We see no sufficient reason for departing from the conclusion there reached, and we also adhere to the opinion adopted in *Atwater v. The American Exchange Nat. Bank*, 40 Ill. App. 501, that "the directors of an insolvent corporation can not by a judgment note or otherwise, procure the company to do anything which shall give them a preference. Nor can

they act as agents for, or in the interest of, any creditor in securing for him such preference.

“As soon as a corporation becomes insolvent, its directors become trustees for all the creditors, and their fiduciary relation will not allow them to assist a creditor to obtain an advantage over other creditors.”

The creditors who obtained preferences from the Brabrook Tailoring Company were in no instance officers, directors or agents of that corporation; nor did any officer, director or agent of said company act for the creditors in obtaining such preference; on the contrary they acted for themselves, and there is no evidence, save mere inference, sought to be drawn, that any of the officers or agents of the company intended to give these creditors a preference; the intention of the company's officers was in consideration of a loan of \$5,000, made to the company to give to the creditors judgment notes; which notes, once obtained, the holders thereof immediately put into judgments, without consultation with or aid from any director or officer of the company.

So far from the entry of judgment being what was intended by any of the officers or directors of the company, they all testify that the loan was obtained and the notes given to enable the company to continue its business and to relieve it from a temporary embarrassment, and that the entry of judgments was a surprise to them. That, seeing the wreck that followed the entry of these judgments, some of the officers of the company may have drawn from it funds in payment of obligations due from it to them or otherwise, can not affect the rights of the judgment creditors, who are not shown to have had anything to do with such withdrawal of funds.

In *Brabrook Tailoring Co. v. Belding Bros. & Co.*, 40 Ill. App. 326, we held that the bill filed in that case did not present sufficient ground for the appointment of a receiver or the dissolution of the corporation. Much that is there said is applicable to the present case.

It is urged that the conduct and condition of the corpo-

ration amounted to a voluntary assignment. We do not regard the action of the corporation, as amounting to a voluntary assignment. *First Nat. Bank v. Howell*, 41 Ill. App. 383.

If the conduct of the Tailoring Company is to be construed, as appellants insist it should be, it is not one of the functions of the Circuit Court to, by construction, create a voluntary general assignment under the statute of this State relating to voluntary assignments by insolvent debtors.

It may be that the creditors of the Tailoring Co. can, under proper proceedings, maintain a claim against the stockholders of the company for money withdrawn when the company was insolvent; such claim is not here urged, and could not, under what is shown in the record of this cause, be here sustained. The conclusion arrived at in this case, renders it unnecessary to pass upon the motion to dismiss the appeal.

We find no error in the decree of the Circuit Court and it is affirmed.

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Traders Insurance Co. v. Pacaud & Co.

1. *INSURANCE—In Whose Name Suit to be Brought.*—Where an insurance policy contained the following clause—"The Traders Insurance Company of Chicago, in consideration of \$37.50, do insure J. H. Million against loss or damage by fire to the amount of \$3,500 on grain, the assured's property, or held by assured in trust or on commission, or sold but not delivered, while in the Kakoka Elevator at Kakoka, Missouri, loss, if any, payable to A. L. Pacaud & Co., as interest may appear," *it was held* that a suit against the company in case of a loss was properly brought in the name of A. L. Pacaud & Co.

2. *INSURANCE—Statement as to Ownership of Property Insured.*—It is not often that an assured is or can be the sole and unincumbered owner of any property. Property of all kinds is for the greater portion of each year incumbered by liens for taxes, water and other rents, special assessments, etc. Substantial accuracy in this regard, truthful statement, honest dealing is all that is required.

3. *INSURANCE—Acceptance of Premium—Estoppel.*—Where an insurance company accepted and retained the premium paid for the insur-

Traders Ins. Co. v. Pačaud & Co.

ance, never offering to return it, a jury will be warranted in finding that the company is estopped to urge that it had never incurred any liability.

4. *INSURANCE—Insurable Interest.*—Where a policy of insurance provided that the loss, if any, was to be paid to a person as his interest might appear, if at the time of the loss he had no interest in the property insured, or if its destruction was then, to him, a matter of pecuniary indifference, he can not recover.

5. *INSURANCE—Contributing Insurance.*—Contributing insurance is insurance of the same property interest. A mortgagor may insure his interest, a mortgagee, his, each being upon the same building is not of the same property and does not contribute.

GARY, J., dissents.

Memorandum.—Action on a policy of insurance. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

SCHUYLER & KREMER, appellant's attorneys.

APPELLEES' BRIEF, ROBERT RAE, ATTORNEY.

It takes slight evidence in a case of this kind, where a party has received the price of insurance from an agent, to establish the agency where the company, after the receipt of the premium, attempts to escape all liability by setting up the defense that the agent was not its agent, but was the agent of the assured. *Gosch v. Ins. Co.*, 44 Ill. App. 265; *Ins. Co. v. Barrel Co.*, 114 Ill. 99; *Ins. Co. v. Scammon*, 110 Ill. 168; *Pierce v. People*, 106 Ill. 13; *Ins. Co. v. Clapp*, 93 Ill. 96; *Ins. Co. v. Ward*, 90 Ill. 545.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a suit brought by appellees upon a policy of insurance issued by the defendant to them. The policy read in part as follows: "The Traders Insurance Company of Chicago, in consideration of \$87.50, do insure J. H. Million

against loss or damage by fire to the amount of \$3,500 on grain, the assured's property, or held by assured in trust or on commission, or sold but not delivered, while in the Kahoka elevator at Kahoka, Missouri, loss, if any, payable to A. L. Pacaud & Co., as interest may appear."

Prior to, and at the time this insurance was effected, and the loss thereunder occurred, J. H. Million had a warehouse and was engaged in buying and storing grain at Kahoka, Missouri. The business was carried on in the name of Million & Bott; Mr. Million furnished the capital and Mr. Bott looked after the business. Mr. Bott's only interest in the business was one-half of the profits which might be made therefrom, which was to be paid to him in lieu of salary. The plaintiffs had been making advances to Million & Bott to enable them to purchase grain, and at the time of the insurance and loss, had advanced to them something over \$6,000, for which they held warehouse receipts issued by Million & Bott, covering 6,000 bushels of corn and 2,000 bushels of wheat.

The loss was a total one, and the value of the grain for which appellees held warehouse receipts, amounted to more than the total insurance held by them, which was \$5,000. Million & Bott, at the time of the fire, also held insurance policies in various companies amounting to \$5,200, on the grain and other property in the said elevator. These insurance policies held by Million & Bott were, after the loss, assigned to the plaintiffs. The fire occurred on the 16th of December, 1890, and on the 22d day of the same month the proofs of loss delivered to appellant, were made out.

In the proofs of loss furnished by appellees to appellant, a statement was made of the insurance taken out by Million & Bott in their own name, and made payable to them, this proof of loss having been furnished to appellant on the 22d day of December; on about the 16th of January, or some thirty days after the insurance was effected, the premium was paid by plaintiffs to appellant and by it received without objection.

In the suit below appellant defended on the grounds, first,

that this suit should have been brought in the name of Million & Bott as owners of the property, and can not be maintained by appellees; and also upon the ground that Million & Bott were the owners of the property, and that therefore the ownership was incorrectly described in the policy, it speaking of J. H. Million as the owner. The policy contained the following among other provisions:

First. That "if the interest of the assured in the personal property be other than its unincumbered and sole ownership without such fact being indorsed upon the policy, the same shall be void."

Second. That "in case of any other insurance upon the property hereby insured, whether valid or not, or made prior or subsequent to the date of this policy, assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby assured bears to the whole amount so insured thereon. * * * Any insurance, floating or otherwise, attaching in whole or in part to the property covered by this policy, shall, as between the insured and this company, be considered as contributing insurance for the full amount thereof, and liable as such to pay *pro rata*, any loss, total or partial, on the property hereby insured."

We think that the action was properly brought in the name of appellees. By the terms of the policy the loss is payable to them. They had the right to demand the amount of the loss, and appellant would have been justified in paying them the same. Indeed, under the terms of this policy, appellant could not have acquitted and discharged itself by a payment to J. H. Million or Million & Bott. The Rich & Ontario Navigation Co. v. T. & M. Ins. Co., 58 Mich. 132; Hathaway v. The Orient Ins. Co., 134 N. Y. 409; May on Insurance, Sec. 447; Westchester Fire Ins. Co. v. Foster, 90 Ill. 121; Scammon v. Niagara Fire Ins. Co., 114 Ill. 490.

It is more seriously contended that the interest of J. H. Million was not unincumbered and that he was not the sole owner of the insured property, and that therefore no re

covery can be had. The clause of the policy as to ownership is not to be construed as something that must be stated with technical accuracy by the party taking out the insurance. It is required that the policy shall contain a substantially truthful statement of the ownership of the property; and we think that under the evidence the description of the property as that of J. H. Million was substantially accurate; that such was the way that an ordinarily intelligent business man knowing all the circumstances of the relations existing between Million and Bott, would have spoken of this property. Mr. Bott had not any interest in this grain other than such as his agreement with Mr. Million, that in lieu of salary he was to have one-half the profits, gave to him. This did not make him the owner of the grain. It merely gave him an interest in what was done with it; and he does not seem to have regarded himself as an owner, but as he was, an employe, who was to be paid a share of the profits instead of receiving a fixed salary.

Had the policy run to Million & Bott we think appellant might with much force have contended that such statement was incorrect. More especially is it true in this case that a technically accurate statement of the interest of Million or Million & Bott, in this property, is not a matter of the highest consequence. It is not the loss which they or either of them have or had sustained on account of this fire; it is the loss falling upon appellees by reason of their interest in the property destroyed which is under consideration.

If in the complete and absolute sense the interest of the assured must be the "sole and unincumbered ownership," very seldom if ever, could, in ease of loss, a recovery be had under this policy or one containing a similar provision.

It is not often that an assured is or can be the sole, unincumbered owner of any property; property of all kinds is for the greater portion of each year incumbered by liens for taxes, water and other rents, special assessments, etc.

Substantial accuracy in this regard, truthful statement, honest dealing is required. Smith's Mercantile Law, 8th Ed. 405; *In re Universal Fire Ins. Co.*, L. R., 19 Eq. 485; *May on Insurance*, Sec. 276.

By the proofs of loss prepared on December 22d, appellant had full notice of all it now claims as to the interest of Million & Bott, or of Bott in the grain stored at Kahoka. Yet about the 16th of the following January, it received, accepted and still retains the premium paid for this insurance, which it now insists has never been of any effect.

It does not appear that appellant has ever offered to return the premium so paid to it, but while retaining the \$87.50 paid to it for this insurance, it sets up that its policy is and ever has been in no wise binding upon it.

Under the circumstances of the reception and retention of this premium, the jury were warranted in finding appellant estopped to urge that it had never incurred any liability.

Appellants also insist that the policies in other companies taken out in the name of Million & Bott, and payable to them, are what is known as contributing policies, and that a recovery can be had in this case for the proportion, only, which the loss sustained by the plaintiffs bears to the entire insurance, that held by Million & Bott or Million for his or their benefit, and that issued to and held by plaintiffs for their benefit.

It is insurance upon the "property insured" that is to contribute. The property insured by the policies taken out by the plaintiffs was their interest in certain grain. The loss, if any, was to be paid to them as their interest might appear. If at the time of the fire they had no interest in the grain, if its destruction was then, to them, a matter of pecuniary indifference, they can not recover anything.

There was no other insurance on such property, viz., the interest of plaintiffs in this grain. Million or Million & Bott had an interest in this grain, and they took out insurance thereon, but their interest was not the same property as the interest of plaintiffs.

Contributing insurance is insurance of the same property interest. A mortgagor may insure his interest, a mortgagee his, each being upon the same building is not of the same property and does not contribute. *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490-501; *McMasters v. Ins. Co.*, 55 N. Y.

VOL. 51.] Columbian Light, Heat & Power Co. v. Bunker.

22; Titus v. The Ins. Co., 81 N. Y. 415; Fox v. Ins. Co., 52 Me. 333; Phillips on Ins., Sec. 359.

The thing itself, a property interest in which is the subject of fire insurance, is often in common parlance and sometimes by courts spoken of as that which is insured. All fire policies, so far as we have observed, certainly all now under consideration, are only of the interest of some one in certain property, and the respective companies are liable only to the extent of such interest, without reference to the fact that the value of the property destroyed may be many times greater.

The policies taken out in the name of Million & Bott having after the fire been assigned to plaintiffs, they offered to assign them to appellants, thus giving appellants the full benefit of the insurance, which they insist is to be treated as contributing insurance.

We find in this record no error requiring a reversal of the judgment of the court below, and it is affirmed.

MR. JUSTICE GARY dissents.

Columbian Light, Heat & Power Co. and Bear Magneto-Electric Co. v. Charles H. Bunker, Assignee of Belding Motor and Manufacturing Co.

1. *APPEALS—In Cases Under the Assignment Act.*—An appeal does not lie to the Circuit Court from an order made by the county in a proceeding under the act relating to voluntary assignments.

Memorandum.—Voluntary assignments. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion Filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

BARKER & CHURCH, attorneys for appellants.

M. B. & F. S. LOOMIS, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

We copy from appellants' brief the facts of the case as follows: "Appellants herein, through their agent, T. F. Indermille, made a bid in the County Court for the plant and assets of the Belding Motor and Manufacturing Company, insolvent, which bid the assignee of said insolvent was ordered by the County Court to accept. Appellants then paid to said assignee \$2,500 as earnest money and to apply on said purchase, and afterward a further sum of \$500 for the same purpose; and with permission entered into possession of the plant. Assignee then refused to turn over a part of the property bid for. On June 30, 1892, the County Court ordered appellants to comply with terms of bid by 10 A. M. of the next day or that earnest money be forfeited. Appellants thereupon filed their motion and petition praying that said order be vacated, and that assignee be ordered to turn over property bid for, and petitioners be permitted to complete purchase. Assignee filed his answer to said petition, and on July 12, 1892, the County Court entered an order denying the prayer of the petition making absolute the order of June 30th and forfeiting said earnest money. At this time appellants prayed and afterward duly perfected, an appeal to the Circuit Court of Cook County. On the 19th of January, 1893, C. H. Bunker, assignee, filed his special appearance in the Circuit Court, and also his motion to dismiss the appeal for want of jurisdiction of that court. On May 27, 1893, the Circuit Court dismissed the appeal for want of jurisdiction, from which order this appeal is taken."

The question in the case is whether the Circuit Court had jurisdiction of the appeal from the County Court.

This question is settled in favor of the appellee, and of the action of the Circuit Court, by the decision of the Supreme Court in *Union Trust Co. v. Trumbull*, 137 Ill. 146, and we refer to the opinion in that case for the reasons.

The order of the Circuit Court will therefore be affirmed.

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Peabody et al. v. Dewey.

1. **CONTRACTS**—*Identification of Things Referred to by Parol Evidence.*—When the identity of a thing referred to in a written contract is left uncertain, it is proper to hear parol evidence to determine which of two or more things answering the description, was meant by the parties.

Memorandum.—**Assumpsit.** Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this Court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

EDWIN BURRITT SMITH and JAMES D. ANDREWS, attorneys for appellants.

RUNYAN & RUNYAN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This cause was submitted to the court below without a jury.

The appellants are mortgage loan agents, in Chicago, and the appellee is engaged in the real estate business for himself and also as an agent or broker for others in real estate and mortgages.

In the summer of 1890, the appellee applied to the appellants for a loan to himself of \$250,000, on certain of his real estate.

In furtherance of the transaction he signed a written contract, called an application for a loan, whereby he engaged appellants to procure for him the loan in question for a commission of two and one-half per cent on the amount thereof.

It was set out in the application that the loan should be secured by a "principal note and interest notes and a mortgage or trust deed (in your usual form) conveying," etc., certain described premises.

The appellants procured the loan to be agreed to be made to appellee, by a correspondent of theirs living in Philadelphia.

When the requisite papers were prepared and presented to appellee for execution, he observed that the loan and interest were made payable, by the terms thereof, "in the gold coin of the United States of the present standard of weight and fineness," and on that account, only, refused to execute them.

The question is: What is the effect of the agreement, or application, signed by appellee, and did appellee agree thereby to secure the repayment of the loan by executing papers requiring its repayment to be made in gold coin?

The application which was signed by appellee was one of a printed form that had been used by appellants in their business for many years.

What was the "usual form" of papers employed by appellants in their business, was a question of fact.

On three former occasions, in 1885 and 1886, appellants had negotiated loans to appellee, in each of which transactions the appellee had signed applications exactly like the one employed in this transaction, so far as the printed part of it relating to this agreement to execute notes and mortgages in accordance with the "usual form" used by appellants, was concerned, and the notes and mortgages he executed to secure those loans did not contain a gold clause. As agent for others he had also had occasion about two years before, to become acquainted with the forms used by appellants.

The use of notes and mortgages containing a gold clause did not begin in appellant's business until about nine months previous to the making of the application for the loan in question, and no mention was made to appellee at the time he made the application, and he had no knowledge, that appellants had made a change in the form of their notes and mortgages so as to embody a gold clause in them, or that he would be required to repay the loan in any money other than that constituting legal tender under the United States laws.

The application for the loan, referring, as it does, to other papers, to wit, the "usual form" of notes and mortgages employed in the business of appellants, and it being undisputed that the forms had been changed from those used by the parties in their previous transactions of a similar kind, without the knowledge of appellee, the question of fact arose as to what forms were intended by the parties; and parol evidence was admissible to determine that fact. When the identity of a thing referred to in a written contract is left uncertain it is proper to hear parol evidence to determine which of two things answering the description was meant by the parties.

By the 16th proposition, misnamed one of law, submitted to and held by the court, it was found and held that the forms presented to appellee for his execution were in the usual form employed by the appellants at the date of the contract; and by the 10th, 14th and 15th propositions, the court refused to hold, as a matter of law, that "your usual form," as employed in the contract, referred to the form then in use by the appellants.

It would seem, therefore, that the court must have found from the evidence that the parties' minds did not meet at all, the appellants meaning the form in use by them at that time, and the appellee meaning the form used between them in previous transactions, and hence there was no binding contract between them; or else that what was meant by the "usual form" was the form that had been used by the parties in their former transactions of a similar kind.

There was evidence that tended to support either finding, and we are not at liberty, where there was conflicting evidence, to set aside the conclusion that the court reached.

Under well settled rules of law the application, or contract, was open to parol explanation, and the question of the effect of the contract, as one of law merely, does not arise upon its face.

The facts having been found against the appellants, upon conflicting evidence, the judgment of the Circuit Court must be affirmed.

Maggie T. Whittaker v. David H. Whittaker.

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1. DECREE—*Presumably Correct*.—A decree of a court is presumably correct until the contrary is established.

2. DIVORCE—*Upheld by Estoppel*.—A divorce absolutely void may be upheld by estoppel. An estoppel *in pais* is to prevent injustice; and no greater injustice could be perpetrated under color of law, than to hold that a woman who has in good faith procured a divorce and married again, is still the wife of the former husband.

Memorandum.—Divorce. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, DEFREES, BRACE & RITTER, ATTORNEYS.

Actions for divorce involve public interests as well as private rights. While the court should take care that divorces are not granted on insufficient evidence, they should also see that when granted, they are not set aside (even upon the application of a party) unless the application is made upon substantial and just grounds and with reasonable diligence. *Quigley v. Quigley*, 45 Hun, 23.

This statutory provision is nothing more than a legislative recognition of the principle of public policy, which has been repeatedly affirmed by the courts, that a judgment or decree which affects directly the status of married persons, by sundering the matrimonial tie, and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be re-opened. Such a course would endanger the peace and good order of society, and the happiness and well-being of those who, innocently relying upon the stability of a decree of a court of competent jurisdiction, have formed a connection with the person who, wrongfully, perhaps, procured its promulgation. *Parish v. Parish*, 9 Ohio State, 534; *Bascom v. Bascom*, 7 Ohio, 466; *Laughery v. Laughery*, 15 Ohio, 404; *Tappan v. Tappan*, 6

Ohio St. 64; Lucas v. Lucas, 3 Gray, 136; Greene v. Greene, 2 Gray, 361.

APPELLEE'S BRIEF, CRATTY BROS. & JARVIS, ATTORNEYS.

Public policy, to the exclusion of individual considerations, requires the dignity and respect of the courts of this State to be upheld, and that our courts be not made the object of fraudulent practices by disconsolate couples. Way v. Way, 64 Ill. 406, 413; Hitchins v. Hitchins, 41 Ill. App. 82.

That the same public policy must be upheld in cases where the decree is obtained by fraud, even though the parties thereto have re-married. Lawrence v. Lawrence, 73 Ill. 577; Caswell v. Caswell, 120 Ill. 387, and cases cited; Smith v. Smith, 20 Mo. 167; Allen v. McClellan, 12 Pa. St. 328; Holmes v. Holmes, 63 Me. 420; Comstock v. Adams, 23 Kan. 517; True v. True, 6 Minn. 458.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

October 26, 1887, the appellant filed in the Superior Court her bill for a divorce from the appellee, and December 22d, following, obtained a decree on service only by publication. Six days more delay by the appellee, and that decree would have been invulnerable against the attack now made upon it; but December 17, 1890, on the appellee's petition the court gave him leave to answer the bill and restored the cause to the docket of the court.

This course of proceeding is warranted by Lawrence v. Lawrence, 73 Ill. 577, under Sec. 19, Ch. 22, Chancery, though it puts the appellant in an awkward position, she having taken another husband in the summer of 1889.

On the last hearing the evidence is very persuasive that she had good cause for a divorce on the grounds of desertion and habitual drunkenness, but is rather thin as to her residence of one year in Illinois, next before filing her bill. But her decree is presumably correct until the contrary is established. Bruner v. Battell, 83 Ill. 317.

And this is a case for straining a point, and sustaining her decree, if it can be done consistently with imperative

Whittaker v. Whittaker.

rules of law. He knew of the divorce within six months after the decree. He don't want her as a wife. He took no step until more than a year after he knew she had married again. His statement that his only motive and purpose or desire to avoid the force of this decree is to reserve "his rights to the boy," is a mere pretense, as the court may at any time make such order as to the boy "as shall appear reasonable and proper." *Umlauf v. Umlauf*, 128 Ill. 378.

His pursuit of the woman is unjust and cruel. As a husband, he was unworthy of her affection, and gave her no shelter or abiding place. The best reparation of the wrong he did her in marrying her, is to let her alone. If in any case of husband and wife their relations can be affected by estoppel, he should be estopped from any claim upon her. And there is authority that a divorce absolutely void may be upheld by estoppel.

In *Richeson v. Simmons*, 47 Mo. 20, an unconstitutional legislative divorce was thus sustained.

It is true that the question arose there between third parties, and only as to property. But estoppel *in pais* is to prevent injustice; *Bigelow on Estoppel*, Ch. 18; and no greater injustice could be perpetrated under color of law, than to hold that this woman is now the wife of this man.

The decree of the Superior Court that the decree of divorce be set aside and vacated is reversed, the original decree confirmed and the petition of the appellee dismissed.

The original decree having been entered before SHEPARD, P. J., when in the Superior Court, he takes no part in this decision.

MR. JUSTICE WATERMAN.

The statute under which the application of appellee to set aside the decree of divorce obtained by appellant is made, does not make it imperative upon the court to set aside the decree, although upon the hearing and under such a petition it appears that the decree ought not to have been made; the statute declares that upon its appearing "that such decree ought not to have been made against such defendant, the

same may be set aside, altered or amended as shall appear just." Sec. 19, chapter 22, R. S.

It does not appear just, that at the instance of this defendant, who waited until more than a year had elapsed after he learned that his divorced wife had re-married, and two years and six months after he heard of her divorce, before he asked to have the decree set aside, and who declares that he has no intention of living with her again and himself wants a divorce—it does not, as above stated, appear just that at the instance of this man the decree against him should be set aside.

Ordinarily there may be said to be three parties to a proceeding for divorce; the husband and wife and the public; because the interests of all are to be affected.

Upon the application to set aside the decree obtained against appellee, there is in effect a fourth party—the second husband—to whom appellant was married one year after her divorce from appellee.

He, certainly, appears to be entirely innocent; no shadow of suspicion is by this record cast upon him. It is not incumbent upon parties about to enter into the married state to search the records for evidence of a previous marriage, nor are they chargeable with notice of errors and imperfections that may exist in divorce proceedings.

A court of equity may well pause before gratifying the malignity of one who wishes to set aside a decree, not that he may enjoy the rights it deprived him of, but that he may be judicially declared to be the husband of one with whom he says he will not live, whom he accuses of both perjury and adultery, and from whom he really wishes to be divorced. If she be declared to be still his wife, he can not compel her to go with him an inch, to live with him a moment or to contribute to him a penny of her property; but if he succeed in what he has undertaken he can render her wretched, and he will deprive an innocent man of the wife with whom he is living, render the further continuance of their marital relations unlawful, break up a home, blast at least one innocent life.

Smith v. Keeler.

That the conduct of appellee was such as to, in this State, entitle appellant to a divorce is clear; while the fair preponderance of the evidence is that she had been a resident of this State for more than a year prior to the filing of her bill.

Such being the case the original decree should have been affirmed upon the hearing had under the petition and answer of appellee.

Catherine Smith, Executrix, etc. v. Keeler.

1. REAL ESTATE BROKER—*When Entitled to Commissions.*—A real estate broker found a purchaser who "was ready and willing to carry out the contract." *It was held*, that the word "ready" implied that he was able and willing and that the broker was entitled to his commission.

Memorandum.—*Assumpsit.* Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

OSBORNE BROTHERS & BURGETT, attorneys for appellant.

ELBERT H. GARY, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case, tried by the court without a jury, involves only questions of fact, unless an objection to the alleged want of evidence raises a question of law.

The testimony is that Harlow P. Smith, the testator of the appellant, retained the appellee, a real estate broker, to sell some property for \$100 per foot; the appellee to have as his commissions, all that he could get over that price. The authority was by parol, yet the appellee made a sale and a contract in writing, for a price that gave him a liberal commission.

51	267
151	518
51	267
57	136
51	267
60	626

The clerk of the appellee told the deceased that the sale had been made and he said he would come down the next day.

He came and the appellee then told the deceased the sale had been made, and he refused to carry out the sale, and this action is for the commissions.

Whether the terms of the contract as to time and other details are such as the deceased could or would have objected to, is a question not in the case, as he put his refusal wholly upon the price. If he had objected to the terms, it is not improbable that the purchaser would have acceded to such modifications as the deceased might have desired. The purchaser testified, "I was ready to carry out the contract." "Ready" implies that he was able and willing, especially as no question was made about it on the trial. *Crouse v. Rhodes*, 50 Ill. App. 121; 1 Chit. Pl. 330; *Morton v. Lamb*, 7 D. & E. 125; *Rawson v. Johnson*, 1 East, 203.

When the appellee rested, the counsel of the appellant said "I have no witnesses," and the court proceeded to express an opinion on the case, and having done so to the extent of five sentences, the appellant then offered to put in evidence a bill filed by her, to remove the contract, which had been recorded, as a cloud upon her title, to which the court said, "It is too late," and the appellant excepted.

Whether it was too late is unimportant. Holding, as we do, that making the sale and the contract—though unauthorized not objected to—entitled the appellee to commissions, whatever the appellant did was indifferent to the appellee, and besides, the offer of the chancery proceedings was unaccompanied by any offer to show expense or trouble in connection therewith. Affirmed.

MR. JUSTICE WATERMAN.

Appellee did not become entitled to commissions by making a contract of sale, the terms of which were not such as his principal had authorized; nor did the failure of his principal to specifically object to the unauthorized terms entitle appellee to commissions; only by an assent to the sale as

Cook v. Haussen.

made, or by availing himself of what appellee had done, could appellee's principal have become liable to pay commissions; his principal neither assented to nor obtained any benefit from what appellee did.

Cook v. Haussen et al.

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72	105
73	256
75	59
51	269
80	513

1. EVIDENCE—*Irrelevant, Properly Excluded*.—Evidence having no apparent relevancy to the matter in controversy is properly excluded where there is no statement as to what the party offering it expects to prove.

Memorandum.—*Assumpsit*. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

MAX ROBINSON, attorney for appellant.

FRANK J. CRAWFORD, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant sued the appellees for work and materials furnished, as he says, upon their promise to pay for it.

The appellees had a contract for building a house; sub-let a portion of it to one Schultz, who sub-let a part of his contract to the appellant. The appellant had done a portion of the work under his contract, and been paid for such portion, partly if not wholly, by Schultz. Schultz died, and the appellant's case is that the appellees promised that they would pay him if he would complete his contract with Schultz.

This the appellees denied, and upon conflicting testimony, given more than seven years after the work was finished, the court trying the case without a jury decided against the

appellant. We can not say that the judge did not come to the right conclusion.

Another sub-contractor under Schultz, was a witness for the appellant, and was asked: "What was said by Mr. Haussen to you with reference to that work then?" and "Did Mr. Haussen ever pay you anything on your contract?"

To the refusal by the court to permit those questions to be answered, the appellant excepted.

It would be a sufficient answer to the exceptions that the appellant made no statement of what he expected to prove. *Gaffield v. Scott*, 33 Ill. App. 317; and see *C. & A. R. R. v. Shenk*, 131 Ill. 283.

But if it was expected that the witness would say that Haussen did promise to pay and did pay the witness, that would be no corroboration of the appellant's claim of a like promise to him. The judgment is affirmed.

Ryerson & Son v. Smith, Assignee of the Porter Boiler Manufacturing Co.

1. **MECHANICS' LIENS**.—*Construction of the Statute.*—The 29th section of the statute, Ch. 82, entitled *Liens*, gives a lien to one who furnishes materials. Section 30 of the same requires a notice to the owner from the one who does so. Section 33 enacts that "No claim shall be a lien under section 29, except so far as the owner may be indebted to the contractor at the time of giving such notice."

2. **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**.—*Effect upon Mechanics' Liens.*—Section 11 of the act concerning assignments enables the assignee "to sue for and recover" in his own name "everything belonging" to the estate of the assignor; the legal title of choses in action of the assignor must therefore, by the assignment, vest in the assignee, and the owner is no longer indebted to the contractor.

Memorandum.—Assignment for the benefit of creditors. Appeal from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

Ryerson & Son v. Smith.

The statement of facts is contained in the opinion of the court.

RUNNELLS & BURRY and ARTHUR RYERSON, attorneys for appellant.

HAMLIN, SCOTT & LORD, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

I write the opinion of the majority of the court, which is in accord with all the direct authority upon the subject, but which I believe to be wrong; and as the authorities are all, save one in the second district—*Nesbitt v. Dickover*, 22 Ill. App. 140—from other States, we are not bound to follow them.

The appellant is a corporation and the appellee is the assignee for the benefit of creditors of the Porter Boiler Mfg. Co., the assets being administered under the direction of the County Court.

The Boiler Co. was a contractor for the erection of structures of very considerable cost, and the appellant as a sub-contractor, furnished the Boiler Co. with materials therefor to the amount of over \$3,500. While the structures were being erected the Boiler Co. made the assignment to the appellee, and he, under the order of the County Court, completed them. The materials furnished by the appellant were all supplied before the assignment, but the notices by the appellant to the owners of the structures for whom they were erected, were not given until after the assignment. No statement of facts in more minute detail is necessary, as the single question in the case is: Does the assignment cut off the claim of the appellant, under the mechanics' lien law, upon the owners?

The 29th section of the statute, Ch. 82, Liens, gives a lien to one who furnishes materials. Section 30 requires a notice to the owner from the one who does so. Section 33 enacts that "No claim * * * shall be a lien under section 29 * * * except so far as the owner may be

indebted to the contractor at the time of giving such notice," with other provisions not applicable to this case.

Section 11 of the act concerning assignments enables the assignee "to sue for and recover" in his own name "everything belonging" to the estate of the assignor. The legal title of choses in action of the assignor must therefore, by the assignment, vest in the assignee, and the owner is no longer indebted to the contractor.

Upon this ground, in effect, all the cases are based, though some of them are cases in which only an equitable title passed, or the fund was attached by garnishee process. *Nesbitt v. Dickover*, *supra*; *Craig v. Smith*, 37 N. J. Law, 549; *Kulp v. Chamberlain*, 31 N. E. Rep. 376; *Dorestan v. Kreig*, 66 Wis. 604; *Hall v. Banks*, 79 Wis. 229; *Copeland v. Manton*, 22 Ohio St. 398.

So far as we have access to the legislation in this State, it manifests a policy that those who contribute to an increased value of real property by labor or materials should have a lien upon the property. That "derogation of the common law" and "strict construction" have been obstacles to carrying out that policy, seems not a far-fetched conclusion.

My own opinion is that the words in section 33 "may be indebted to the contractor," should be read as meaning "indebted upon the contract."

The judgment of the County Court to the contrary is affirmed.

Sebastian v. Hill et al.

1. TENANCIES—*From Month to Month—Implication from Payment of Rent.*—From the occupation and payment of monthly rent the law creates a tenancy from month to month.

Memorandum.—Action for rent. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed December 21, 1893.

Sebastian v. Hill

The statement of facts is contained in the opinion of the court.

JESSE HOLDOM, attorney for appellant.

P. McHUGH, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellees sued the appellant for rent accruing after November, 1890. The appellant quit in October and paid the rent for November. The only contest is whether the appellant was tenant from month to month or by the year.

The parties had a conversation about the rent which Hill testified terminated in an agreement that the appellant would take a lease for three years, but if after one year the appellant, who was in the service of the Rock Island road, should be removed from service in Chicago, then the lease should become invalid. Hill then sent to the appellant, after he had moved into the house, a lease for three years, from October 1, 1889, containing this clause:

"It is expressly understood and agreed by and between the parties hereto that if said John Sebastian, being now connected with the Chicago, Rock Island & Pacific Railroad Company, shall by reason of his connection with said company be obliged to remove from said city of Chicago, notice of this shall be given by the said party of the second part to the said party of the first part, and this lease shall then terminate at the end of the fiscal year in which said notice shall be given."

Sebastian returned the lease with this letter:

"CHICAGO, Dec. 14, 1889.

MR. J. J. HILL, Chicago, Ill.

Dear Sir: I am sorry to have bothered you regarding the payment of last month's rent, but absence in California prevented the payment of same. I send you by bearer \$70 for rent during the month of December, and return herewith lease for my house, which, if you will have re-arranged, leaving out the clause regarding my employment

with the company, I will be glad to sign same, and I will prefer to have it in that way. Make the lease up to the end of the year from the time I occupy the house. I trust this will be satisfactory.

JOHN SEBASTIAN."

Then Hill went to Sebastian; got angry; would not make the lease as Sebastian wanted it; and went away saying, "I shall hold you for that rent and that is all there is to it."

It is clear enough that the only contract between these parties which the law can enforce, is the contract which the law will imply from their conduct. The lease sent was not such as Hill said was agreed upon. The word "fiscal" has no meaning in the connection in which it is used, and with Hill's definition of it, "from October to October," the lease could not "become invalid" at any other time than the end of some month of September or October.

Whatever might be the effect of the letter if Hill had accepted its terms, no contract can be made out of it, as it takes two to make a bargain.

From the occupation and payment of monthly rent the law creates a tenancy from month to month. *Creighton v. Sanders*, 89 Ill. 543; *Warner v. Hale*, 65 Ill. 395.

This result is fatal to the appellees' case, and the judgment is reversed and the cause remanded.

Thom v. Hess.

1. *SHORT CAUSE CALENDAR—Discretion of the Court.*—It is discretionary with the court to stop the trial of a cause on the short cause calendar after more than an hour has been consumed in its trial.

2. *COMPROMISE—Offers of, not Binding.*—Offers of compromise do not bind; but admissions or statements of the facts are evidence, though made in an endeavor to effect a settlement.

Memorandum.—*Assumpsit.* Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1893, and affirmed in part. Opinion filed February 13, 1894.

The statement of facts is contained in the opinion of the court.

WILLIAM BRACE, attorney for appellant; DEFREES, BRACE & RITTER, of counsel.

J. M. HESS, attorney for appellee; STAPP & ARNOLD, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This action is for the value of a trunk and contents, lost from the wagon of the appellant, as the appellee was about to depart on a journey the day after her wedding.

The case was tried on a short cause calendar, and one of the errors assigned is that the court kept on with the trial, against repeated objections by the appellant, after more than an hour had been taken. If the discretion of the court as to stopping the trial is to be controlled in any case, it would not be where it appeared that the defense had been unduly protracted.

The instructions for the appellee are faulty in assuming that the appellant was a common carrier, but it is so clear that he was, if we apply our common knowledge, as a jury would and ought to do, of usual business methods, that the faults may be disregarded.

But one instruction is erroneous. In the interviews between the appellant and the husband of the appellee acting for her, after the loss, as to paying for the trunk and contents, an inventory was presented to the appellant, amounting to \$262.20, which evidence tended to show was made by the husband, dictated by the appellee. The instruction is:

"The jury are instructed that any evidence in reference to the value of the trunk and its contents, which was the result of any conversation in reference to a settlement or compromise between the plaintiff and the defendant of the matter of controversy, is incompetent, and shall not be considered by you in determining the value of the said trunk and its contents."

Offers of compromise do not bind; but admissions or statements of the facts are evidence, though made in an endeavor to effect a settlement. 1 Greenleaf, Ev., Sec. 192.

This error, however, only affects the amount of the verdict, and the appellee having remitted from the judgment of \$350 the excess, the judgment will be affirmed for \$262.20, at the cost of the appellee. Affirmed in part.

OPINION OF MR. JUSTICE GARY ON PETITION FOR REHEARING.

We omitted to notice in the original opinion the alleged error in denying a motion in arrest of judgment. The case was commenced by John M. and Luvenia Hess. All the pleadings remain so. At the trial an order was made thus: "On motion of plaintiff's attorney it is ordered that all papers and proceedings in said cause be, and are hereby amended by discontinuing as to the co-plaintiff, J. M. Hess." Inartificial as this may be, the objection that no change was made in the pleadings is purely technical, and if Sec. 6 of Chap. 7, R. S., is to have any effect, should be disregarded.

It is not like *Ogden v. Town of Lake View*, 121 Ill. 422, where leave to introduce a substantial matter was granted, but never acted upon. Here, so far as the pleadings can be affected by an order of record, the amendment is made. We have hitherto disregarded similar objections. *Bensley v. Brockway*, 27 Ill. App. 410; *Wis. Cent. Ry. v. Weiczorck*, No. 4796, last term. Petition denied.

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Frost et al. v. Rand, McNally & Co.

1. BUILDING CONTRACT—*Architect's Certificate*.—Under a contract between parties for the erection of a building providing that payment was to be made upon the presentation of a certificate signed by the architect, it was held, that if the architect refuses to act upon matters left to his decision under the contract, then such certificate ceases to be a condition precedent.

Memorandum.—Assumpsit. In the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Declaration on the common

Frost v. Rand, McNally & Co.

counts; motion to exclude plaintiff's testimony sustained; plaintiff appeals. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

WALLACE HECKMAN and JAS. G. ELSDON, attorneys for appellants.

APPELLEE'S BRIEF, GEO. L. PADDOCK AND H. T. GILBERT,
ATTORNEYS.

It has been repeatedly held that under such a contract as that in controversy the obtaining and presentation of the architect's certificate are conditions precedent to any right of recovery. *Mills v. Weeks*, 21 Ill. 561; *McAuley v. Carter*, 22 Ill. 53; *Downey v. O'Donnell*, 86 Ill. 49; *Packard v. VanSchoick*, 58 Ill. 328; *Badger v. Kerber*, 61 Ill. 79; *Korf v. Lull*, 70 Ill. 520; *Coey v. Lehman*, 79 Ill. 173; *Downey v. O'Donnell*, 92 Ill. 559; *Barney v. Childs*, 120 Ill. 154; *Vermont St. Church v. Brose*, 104 Ill. 215; *Michaelis v. Wolf*, 136 Ill. 68.

The parties, by their contract, have made the architect an umpire or arbitrator to settle all disputes and differences growing out of their contract, and the payment should only be made on his certificate that money was due under the agreement. Having made the agreement, they must be governed by it, unless the architect should act in bad faith, refuse to act, become incapacitated to act, or be prevented by some unforeseen or uncontrollable cause. *Fowler v. Deckman*, 84 Ill. 130.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants were contractors for the ornamental iron work for a magnificent building erected by the appellee — a corporation — in the city of Chicago. They sued for money which they claimed was due, having completed their contract.

The case is very voluminous, but the question for us is in a small compass.

The contract between the parties was the usual one to pay "upon the presentation of certificates signed by the" architects, and as the architects would not give the certificates, the court held that the appellants had no case. That under such contracts architects' certificates are conditions precedent to payment, is no better settled than is the exception that if the architects refuse to act upon the matters left to their decision, then such certificates cease to be conditions precedent. *Fowler v. Deakman*, 84 Ill. 130.

The appellants were delayed by other contractors whose work preceded that of the appellants. The contract provided that "the owners may at any time make, or require to be made, any alterations in the plans, material or workmanship that said owners may deem proper, without annulling or invalidating this agreement; and in case of any such alteration or deviations from the plans or specifications, involving an increased or diminished expense in the parts so altered, the amount thereof to be allowed to the contractors or owners shall be such as may be equitable and just; and in case such alterations and deviations require additional time for execution, a fair and reasonable amount shall be added to the time stipulated for the completion of the said building, as set forth in the specifications. Should delays be caused by other contractors to the positive hindrance of the contractors hereto, a just and proper amount of extra time shall be allowed by the architects, provided said contractors shall have given written notice to the architects at the time, of such hindrance or delay."

The appellants gave the notice as thus required, but the architects did nothing in pursuance of the power conferred upon them.

Another provision of the contract was that "in case the parties shall fail to agree as to the true value of extra or deducted work, or the amount of extra time, the decision of the architects shall be final and binding; the same in case of any disagreement between the parties relating to the performance of any covenant or agreement herein contained."

The contract also provided: "It is, however, mutually

Frost v. Rand, McNally & Co.

covenanted and agreed that all damages for delay as mentioned in the specifications shall be deducted from the contract price as liquidated damages."

The specifications referred to declare that the work should be finished on or before the 15th day of March, 1890, and provided damages for delay in the following terms:

"And to secure the work at the time and in the manner specified, it is hereby declared and set forth that the damages arising from the non-fulfillment of this contract shall be \$200 for each day the work remains uncompleted after above date, which sum of damages shall be deducted from contract price as liquidated."

It is undisputed that the appellants did all that the contract required of them, but the work was not completed until August, 1890. The unpaid portion of the contract price and extras is \$10,588.53. In October, 1890, the appellants undertook to obtain from the architects a final certificate, and it was the opinion and understanding of all parties then, that the architects had authority to certify what was the true amount that remained unpaid, but the architect held that it was also his duty to pass upon all claims that the parties had against each other, including their respective claims for damages; on the one hand to the appellants for being delayed by other contractors, and on the other hand to the appellee for delay in the completion of the work. In this opinion of the architect the court seems to have concurred and made it the ground of decision.

Acting upon this view of his duty, the architect refused to give to the appellants any certificate except such a one as should be a final certificate of the amount due, if any, to the appellants, after taking into account all claims for damages either way. Not being willing to submit the claims for damages to the decision of the architect, the appellants brought this suit.

A question is made whether, when the appellants gave notice that they were delayed by other contractors, the architects should then have fixed the amount of extra time to be allowed, or might fix it at the close of the work; but in the view we take of the case, that question is unimpor-

tant. If the architect was in point of law right in his view of his duty, the appellants can not recover; if he was wrong, the whole controversy is open for judicial determination on the actual merits between the parties.

The appellee quotes from *Fowler v. Deakman*, 84 Ill. 130 :

"The parties, by their contract, have made the architect an umpire or arbitrator to settle all disputes and differences growing out of their contract, and the payment should only be made on his certificate that money was due under the agreement. Having made the agreement, they must be governed by it, unless the architect should act in bad faith, refuse to act, become incapacitated to act, or be prevented by some unforeseen or uncontrollable cause."

In that case the contract provided that the architect should be the umpire or arbitrator to settle all disputes between the parties to the contract, and that his decision should be binding and conclusive. There is nothing equivalent to that in the contract between these parties.

The value of extra or deducted work, the amount of extra time, items which were left to the architects, do not embrace damages to be allowed for any cause; and the further cause of any disagreement between the parties relating to the performance of any covenant or agreement, may make their decision binding on the question whether there has or has not been such performance, but not as to the reparation for non-performance. It was no part of the duty of the architect to keep an account and "ascertain and allow payments made by the owner to the contractor." *Mills v. Weeks*, 21 Ill. 561.

This court is already committed to the position that the language used in the contract between these parties did not submit questions of damages to the decision of the architect. *Nelson v. Pickwick*, 30 Ill. App. 333.

It follows that the refusal of the architect to decide upon questions within his authority, unless the appellants submitted also questions not within his authority, was such an act as dispensed with the necessity of presenting his certificate. The case should have been left to the jury.

The judgment is reversed and the cause remanded.

Gregg v. Savage.

Gregg v. Savage.

1. GARNISHMENT—*The Term Defined*.—A garnishment is an attachment of the effects of the debtor in the hands of the garnishee, creating no lien upon anything, but holding the garnishee to a personal liability.

2. GARNISHMENT—*Affected by Assignments*.—As between the parties, an assignment, without notice by the assignee to the holder of the fund, takes effect and has precedence of subsequent garnishments against the assignor.

3. GARNISHMENT—*Affected by Assignment of the Fund—Illustration*.—Under the following assignment—"For value received, I, John Q. Savage, do hereby assign, transfer and set over to William M. Gregg of Chicago, Illinois, and to his heirs and assigns, all my interest in certain claims and demands in favor of George W. Savage against the First National Bank of Monmouth, Illinois, for the recovery of which suit has been brought in the name of said George W. Savage for my use in the Circuit Court of the United States for the Northern District of Illinois. My interest aforesaid hereby assigned is more particularly specified in a certain writing executed by said George W. Savage and myself, whereby Dent, Black & Cratty Bros. were retained to conduct legal proceedings to recover the moneys due said George W. Savage, and the said Dent, Black & Cratty Bros. are hereby requested to recognize said William M. Gregg as my assignee, and to give full effect hereto in his behalf, placing him in my stead as to any moneys which may under said agreement become due to me at any time hereafter"—it was held that Messrs. Dent, Black & Cratty Bros. were not liable as garnishees.

Memorandum.—Garnishment and interpleader. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, REED, BROWN & ALLEN, ATTORNEYS.

A chose in action is capable of equitable assignment. The test is whether the assignor has entirely parted with his interest in the thing assigned. Watson v. Smith, 14 S. E. Rep. 640; Sykes v. S. N. B., 49 N. W. Rep. 1058; McDaniel v. Marvel, 27 Pac. Rep. 952; Lanigan v. Bradley, 24 Atlantic Rep. 505; Koch v. Quick, 29 Ill. App. 535; F. W. B. v. Ottawa, 23 Pac. Rep. 485; Phillips v. Edsall, 127 Ill.

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150	161
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60	419
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67	131
67	141
51	281
73	318
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78	409
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80	342

547; Glover v. Well, 40 Ill. App. 350; Home v. Booth, 22 Ill. App. 385; Carr v. Waugh, 28 Ill. 418; Perkins v. Hadsell, 50 Ill. 216; Morris v. Klancy, 51 Ill. 451.

Nor is the chose in action so equitably assigned liable to garnishment. Dressor v. McCord, 96 Ill. 389; Chatroop v. Borgard, 40 Ill. App. 279; Carr v. Waugh, 28 Ill. 418; May v. Baker, 15 Ill. 89; Webster v. Steele, 75 Ill. 545.

JOHN M. HAMILTON, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Frank W. Harding summoned Messrs. Dent & Black, attorneys at this bar, as garnishees, under a judgment he had against Savage.

They answered that they held \$1,809.11, which was claimed by the appellant. He intervened, claiming under an assignment as follows :

“CHICAGO, May 6th, 1885.

For value received, I, John Q. Savage, do hereby assign, transfer and set over to William M. Gregg, of Chicago, Illinois, and to his heirs and assigns, all my interest in certain claims and demands in favor of George W. Savage against the First National Bank of Monmouth, Illinois, for the recovery of which suit has been brought in the name of said George W. Savage for my use in the Circuit Court of the United States for the Northern District of Illinois. My interest aforesaid hereby assigned is more particularly specified in a certain writing executed by said George W. Savage and myself, whereby Dent, Black & Cratty Bros. were retained to conduct legal proceedings to recover the moneys due said George W. Savage; and the said Dent, Black & Cratty Bros. are hereby requested to recognize said William M. Gregg as my assignee, and to give full effect hereto in his behalf, placing him in my stead as to any moneys which may under said agreement become due to me at any time hereafter.

J. Q. SAVAGE. [L. s.]”

The pleadings are voluminous, ending in a judgment against the appellant on a demurrer sustained to his last

Gregg v. Savage.

amended petition asserting his claim, but the only question for us to decide arises on the effect of this assignment.

The petition shows abundant consideration for the assignment, and if a subsequent promise by Gregg to pay part of the money, when received, to the wife of Savage, be a matter of which Harding, as a creditor of Savage, can take advantage, it must be upon circumstances not appearing on this record; for if Gregg be entitled to the money, he may do what he will with it, and do no wrong to Harding.

Messrs. Dent, Black & Cratty Bros., as attorneys, were retained in the suit mentioned in the assignment upon the terms "that all moneys collected in the matter should pass through the hands of said attorneys; and on the refunding to them of any advances made by them and said John Q. Savage for legal expenses, traveling expenses, stenographer's fees and charges for printing, and also after retaining the contingent fee allowed to said attorneys, they were to divide the excess in collection between John Q. Savage and George W. Savage equally."

Clearly, under those terms there was a possibility that money might come to the hands of the attorneys which, as between them and John Q. Savage, would be a definite sum, and in which he alone would have any interest. For that sum, when in their hands, Savage might maintain an action if they would not pay it over.

An assignment of it was not an assignment of a part of a fund, (though as such it would be good in equity—Phillips v. Edsall, 127 Ill. 535), but of the whole fund that might accrue to John Q. Savage; and the fact that it was to be separated from a larger sum, part of which was to go to another person, in no way affected the individuality of the part that John Q. Savage was to have. Such an expectancy is assignable. 1 Am. & Eng. Ency. of Law, title Assignments, p. 826; Bispham, Equity, Sec. 165 *et seq.*

And as between the parties such assignment takes effect, and, without notice by the assignee to the holder of the fund, has precedence of subsequent garnishments against the assignor. *Ibidem*; and see Sheldon v. Hinton, 6 Brad. 216; Woodward v. Brooks, 18 Brad. 150.

A garnishment is an attachment of the effects of the debtor in the hands of the garnishee; creating no lien upon anything, but holding the garnishee to a personal liability. Drake on Attachment, Sec. 453; Wade on Attachment, Sec. 325.

It reaches nothing that does not belong to the debtor. It may be, as the Georgia court calls it, a "water haul." Western R. R. v. Thornton, 60 Ga. 300.

The judgment of the Circuit Court is reversed and the cause remanded.

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McCauley et al. v. Coe et al.

1. **EQUITABLE INTEREST—Right to Mortgage.**—A person having a right under a valid contract to acquire a conveyance of premises of which he is in possession, and under the contract which gives him the right to such possession, the right to acquire a conveyance is an equitable interest in the premises which such person can legally mortgage, and any conveyance such person may afterward make will not abridge the interest of the mortgagee.

2. **FORFEITURES—In Courts of Equity.**—A court of equity will never enforce either a penalty or a forfeiture.

Memorandum.—In chancery. In the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Bill to remove cloud, etc.; decree of dismissal for want of equity; appeal by complainants. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 13, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANTS' BRIEF, E. W. ADKINSON, ATTORNEY.

The proposition contained in the lease constituted but a continuing offer to sell, and could be merged into a contract only by an acceptance and compliance with its terms. Haven & White v. Wakefield et al., 39 Ill. 509; Larmon v. Jordan, 56 Ill. 204; Sutherland v. Parkins, 75 Ill. 338; Corcoran v.

McCauley v. Coe.

White et al., 117 Ill. 118; Harding v. Gibbs, 125 Ill. 85; Willard v. Taloe, 75 U. S. 567.

Even though the stipulation in the case could be constructed as an agreement to sell, there was a forfeiture and termination thereof. Chrisman v. Miller, 21 Ill. 227; Murray v. Schlosser, 44 Ill. 14; O'Neal v. The Wabash Avenue Baptist Church, 48 Ill. 349; Anderson v. McCarty et al., 61 Ill. 64.

APPELLEES' BRIEF, THORNTON & CHANCELLOR, ATTORNEYS.

One having a contract to purchase real estate has such an interest as may be mortgaged. Baker v. Bishop Hill Colony, 45 Ill. 264; Curtis v. Root, 20 Ill. 518; Hagar v. Lawrence Brainerd, 44 Vt. 294; Houghton v. Allen, 16 Pacific, 532.

A lease with privilege of purchase constitutes a mortgagable interest. Bank of Louisville v. Baumeister, 87 Ky. 6.

The agreement between Butler and Stauffer must be considered a contract for sale and not of leasing. They were negotiating for the sale and purchase of the premises and this lease, so-called, was the result of their bargaining, and the sum of \$200 was paid in cash upon the delivery of possession of the premises and the further sum of \$200 was to be paid upon the termination of the term mentioned in the contract, which was a most extraordinary provision for payment of rent, in view of the fact that the premises were not worth more than sixteen or eighteen dollars per month, as shown by the testimony. When there is a plain intention for a contract for sale, the law will construe a lease containing a provision for sale to be a contract for sale notwithstanding the installments to be paid are called rent. Lucas v. Campbell, 88 Ill. 447; Murch v. Wright, 46 Ill. 487; Hervey v. U. S. Locomotive Works, 93 U. S. 664.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This cause comes here by appeal from a decree of the Superior Court dismissing, for want of equity, the supple-

mental bill filed by appellants to have removed, as a cloud upon their title to certain real estate in Cook county, a certain trust deed made by one Butler to the appellee, Coe.

In 1885, Daniel Stauffer was the owner of the premises in question.

Pursuant to some verbal negotiations between himself and the said Butler, Stauffer built a house on the premises according to the desire of Butler, and when the house was finished, and on October 29, 1885, Stauffer executed a lease of the premises to Butler for the term of one year from November 1, 1885, at the specified rental of \$500 for the term, payable in three installments, viz.: \$100 on the execution of the lease; \$100 on January 1, 1886, and \$300 on or before November 1, 1886, "with interest at seven per cent from date and cost of insurance." The lease was drawn on one of the ordinary forms in use in Chicago, and contained all the customary provisions, covenants and conditions.

Following the agreement to pay rent as above, there is contained in the body of the lease, an agreement as follows:

"It is further agreed on full payment of said sums and the further sum of \$1,600, with seven per cent interest from this date in manner following, one note for \$500, due on or before November 1, 1887, and two notes for \$550 each, due respectively November 1, 1888 and 1889, all bearing interest at seven per cent, payable to the order of Daniel Stauffer and secured by a trust deed on above premises, the said first party will convey to second party the above premises by warranty deed, subject to taxes and assessments of A. D. 1885 and subsequent years."

The contract contains no provision concerning a forfeiture, and time is not declared to be of its essence.

"Said sums" refer to the \$500, interest, and cost of insurance, stipulated as rent; and it will be observed that the "further sum of \$1,600" is to draw interest at seven per cent from the date of the lease. It would seem, therefore, that the present value, at the date of the lease, of the consideration for which a conveyance was agreed to be made, was \$2,100, which is the sum Butler testified he agreed to

pay for the premises, including the house, which it is conceded was built for him upon the lots.

Butler made the first payment of \$100 and entered into possession of the premises, and afterward paid the second installment of \$100, but made none of the other payments. Afterward, and while in possession of the premises under the lease, Butler, in conjunction with one Albert B. Pine, executed to the appellee, Albert L. Coe, a trust deed on said premises, dated August 16, 1886, and recorded August 17, 1886, to secure their promissory note of that date for \$400, payable three years after date to the order of one Sarah Curtis, with interest at seven per cent per annum.

The trust deed aforesaid, given to secure this last mentioned note, constitutes the alleged cloud upon the premises.

Afterward, and about November 3, 1886, Butler executed and delivered a quit-claim deed of the premises back to Stauffer, and surrendered possession of the premises to Stauffer.

Stauffer subsequently, and in April, 1890, filed the original bill in this cause to have said trust deed to Coe declared to be a cloud upon the premises and removed as such. While his bill was pending, Stauffer sold and conveyed the premises to the complainants, who, first obtaining leave therefor, filed their supplemental bill, setting up substantially the same facts and praying for the same relief as the original bill.

Whatever may have been the negotiations between Stauffer and Butler which preceded the making of the written agreement, or lease, such negotiations culminated and became merged in that written instrument, and we can look only to that to determine what the contract between the parties was. The contract, so made, was one of leasing, by which both parties were bound, and a contract by Stauffer, by which Butler was not bound, to convey the demised premises to Butler upon certain terms and conditions, the performance of which were optional with Butler. Stauffer could compel the payment by Butler of the \$500 stipulated to be paid as rent, but he could not compel the payment of

the additional \$1,600 for which he had contracted to convey the premises to Butler, except in case Butler should do something further. The agreement by Stauffer to convey the premises was binding upon him only upon condition that Butler should, in addition to paying the \$500, give his notes and trust deed for the further sum of \$1,600. Butler did, however, by paying the first \$200 of the \$500 when it became payable, acquire a right under the contract to have the premises conveyed to him by Stauffer upon paying the remaining \$300 when it should become due, and executing and delivering his notes and trust deed for \$1,600 more. The right to acquire a conveyance of the premises was in full force in Butler at the time he and Pine executed the trust deed to Coe, and he was in possession of the premises under the contract which gave him the right. That right, in our opinion, constituted an equitable interest in the premises which Butler could mortgage, and did mortgage, to the appellee, Coe. *Baker v. Bishop Hill Col.*, 45 Ill. 264; *Hagar v. Brainerd*, 44 Vt. 294; *Bank of Louisville v. Baumeister*, 87 Ky. 6.

The conveyance by quit claim deed subsequently made by Butler to Stauffer, had no effect to abridge the interest acquired by the mortgagee. The mortgage, or trust deed, was on record, and Stauffer was bound with notice of it. What rights or remedies, if any at all, are susceptible of enforcement under the trust deed is quite another matter, about which we express no opinion whatever. No other attempt was made by Stauffer to terminate his contract to convey the premises than the acceptance by him of the quit claim deed thereto made by Butler.

And whether a declaration of forfeiture was necessary, or could have been made, by Stauffer, after Butler had quit-claimed to him all his interest in the premises under the contract, or what effect is to be given to the recitals in that deed, we do not decide. If, as we hold, Butler had an equity in the premises which he could and did mortgage, and Stauffer had notice of the mortgage, then it is plain they could not by any new contract between themselves ad-

versely affect the rights of the mortgagee. To give the relief that is prayed by the appellants would be in effect for a court of equity to declare a forfeiture of the mortgage for the non-performance of a contract the appellees have never been called upon or notified to perform, which is something never done in equity.

“A court of equity will never enforce either a penalty or a forfeiture.” *Traders Ins. Co. v. Race*, 142 Ill. 338.

The questions involved are of much importance, and while we are not in a condition of hesitancy about them, it would be very desirable to have an expression of the Supreme Court upon them. The decree of the Superior Court will be affirmed.

Overman & Cook v. Consolidated Coal Co.

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50	687
51	289
54	233

1. **EXCEPTIONS—When To Be Taken.**—Where no exception is taken to the action of the court in directing the jury to find for the plaintiff, however improper such action may have been, the appellant can not first raise the question in this court.

2. **RECORD—Stipulation as to Bill of Exceptions.**—Where, in a stipulation between the counsel for the parties, entitled in the cause in the Circuit Court, it was agreed “that the original bill of exceptions may be included and incorporated in the record of this case, without being copied therein,” *it was held* that it required no stipulation to make the bill of exceptions a part of the record in the Circuit Court; it became such as soon as signed by the judge and filed. It was not a stipulation that the original bill of exceptions, instead of a copy, might be incorporated into the transcript of the record for this court.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

REED, BROWN & ALLEN, attorneys for appellants.

CHARLES W. THOMAS and COLLINS, GOODRICH, DARROW & VINCENT, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

On the trial of this cause in the Circuit Court, a verdict and judgment were rendered for the appellee against the appellants, in the sum of \$1,139,92.

In argument, the appellants contend that the evidence was not sufficient to support the verdict, and was clearly insufficient to warrant the court in directing the jury to find for the plaintiff, appellee.

It is not contended that any exception was taken to the action of the court in directing the jury to find as was done, and however improper such action was, the appellant can not first raise the question in this court. Whatever our conclusion might be upon a review of the evidence, as to its sufficiency to sustain the verdict and judgment, we are not at liberty to examine.

By a stipulation between the counsel for the parties, entitled in the cause in the Circuit Court, it was agreed "that the original bill of exceptions may be included and incorporated in the record of this case, without being copied therein."

It required no stipulation to make the bill of exceptions a part of the record in the Circuit Court; it became such as soon as signed by the judge and filed. There was no stipulation that the original bill of exceptions, instead of a copy, might be incorporated into the transcript of the record for this court. The statute upon the subject does not permit us to regard what is shown, alone, by a paper so attempted to be stipulated into the record of this court. *Schwartz v. Kalovski* (No. 4,896 this term), and cases there referred to. The judgment of the Circuit Court will be affirmed.

Heffron v. Knickerbocker et al., Executors and Trustees.

1. RES ADJUDICATA—*Partnership Affairs*.—Where the fact that a partnership exists between parties litigant is determined by a court of competent jurisdiction, such determination become *res adjudicata*, and is binding upon the parties affected by it in subsequent litigation where the same question arises.

Memorandum.—Chancery proceedings. Partnership matters. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

OSBORNE BROS. & BURGETT, attorneys for appellant.

JOHN S. COOPER and REMY & MANN, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior Court of Cook County, adjudging a dissolution of partnership and directing a sale of partnership assets, in order to wind up the partnership.

It was decided by this court in *Heffron v. Gore*, 40 Ill. App. 257, that a partnership between the parties existed, and that Gore was entitled to a winding up of the partnership. The question is, therefore, *res adjudicata*, and not open for discussion.

The new evidence does not materially affect the facts as they existed when the case referred to was decided.

It is perfectly manifest that the only way in which the partnership affairs can be wound up, the creditors paid, and the interest of the respective parties adjusted, as between themselves, is by a sale of the partnership assets. There are no new principles of law involved rendering it at all

necessary to set forth the facts afresh. Enough concerning them appears in the opinion of the court in *Heffron v. Gore*, *supra*.

The errors assigned, except such as refer to the main question of the partnership, and a winding up of its affairs, apply merely to the details of the decree, and, not affecting the substantial merits of the controversy, are deemed as too unimportant for discussion.

The decree of the Superior Court will therefore be affirmed.

Gaynor v. Pease Furnace Co.

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78 688

1. EVIDENCE.—*Admissibility of Written Contracts*.—In an action upon a promissory note where a written contract is offered in evidence by the defense, and there is nothing upon the face of it to show any connection between it and the note sued on, an offer to prove that the note was given by the defendant for the work performed under the contract, was held not broad enough to entitle the contract to admission and the court properly excluded the contract.

2. INSTRUCTIONS.—*May be Given Orally When*.—Parties litigant or their counsel may, by agreement, waive the statutory provisions requiring instructions to be given in writing, in any particular case, and the court will presume that such waiver was agreed to when the record shows no exception taken to such oral instructions.

Memorandum.—Assumpsit on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 13, 1894.

The opinion states the case.

THOMAS J. WALSH, attorney for appellant.

TATHAM & WEBSTER, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The declaration in this case consisted of a special count upon a promissory note made by appellant to one Hoffman

and by him indorsed to the appellee, and the common counts.

The plea of the general issue was withdrawn at the trial, appellant thereby confessing the indebtedness upon the note sued on, and although there were several pleas filed, the only one under which appellant offered evidence, was the second, which alleged a contract with the appellee out of which the note arose, a breach of that contract, and a consequent right of set-off.

As tending to sustain such plea, the defendant, appellant here, offered in evidence a written contract which consisted of a detailed proposal, mostly printed, to furnish and set up in the residence of appellant, a certain apparatus for supplying hot water and warm air, which was signed by George D. Hoffman, the payee named in said note, and accepted by the appellant.

To the introduction of that contract the plaintiff objected, and the objection was sustained by the court. Thereupon counsel for the appellant offered to prove that the note sued on was given by the defendant for work performed under the contract offered in evidence, and for that purpose asked the appellant, who was at that time on the stand as a witness in his own behalf, how he came to execute the note, and to such question the appellee objected, on the grounds of incompetency and irrelevancy, and the court sustained the objection. And thereupon the appellant again offered said written contract in evidence, to which offer objection by the plaintiff was again interposed, and the objection was sustained by the court.

The ruling of the court in refusing to admit in evidence the written contract offered by appellant is assigned as error.

The offer was simply of the written instrument. On the face alone, of the paper, there was nothing to show any connection whatever between it and the note sued on.

There was no offer made by counsel to show that Hoffman, the party in whose name the proposal was submitted, and to whom the note was made payable, was acting in the transaction as the agent of the appellee, and it does not

appear that the admission in evidence of the proposal or contract by itself would have had any tendency to prove such agency.

The mere fact of Hoffman's name appearing on the printed heading of the paper as the "general western manager" of the appellee, would not of itself have had any tendency to prove that in the particular transaction he was acting as appellee's agent. *Summers v. Hibbard*, 50 Ill. App. 381.

Indeed everything, except that printed heading which appears in the proposal, tends strongly to repel any such inference or presumption. The entire language of the proposal indicates very strongly that the undertaking was Hoffman's individual contract, and it is signed by him as for himself.

The offer was not broad enough, and the court properly excluded the paper. *Gaffield v. Scott*, 33 Ill. App. 317.

The bill of exceptions shows that the court instructed the jury orally to find for the plaintiff in the sum for which the verdict was rendered.

Our statute is explicit in forbidding oral instructions to the jury.

"Hereafter no judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing." Sec. 53, Chap. 110, entitled Practice.

But parties or their counsel, may, by agreement, waive the statute in any particular case, and we will presume that such waiver was agreed to in this case, the record showing no exception preserved on that ground.

The second assignment of error is that the court erred in instructing the jury to find for the appellee, but such an assignment relates to the substance and not to the form of the instruction.

Non constat, but if the form of the instruction had been excepted to, the court would have then and there corrected the error by a written instruction to the same effect.

In substance, the instruction was entirely proper under the evidence.

The judgment of the Circuit Court will be affirmed.

Brown v. McKay.

Brown et al. v. McKay.

1. MASTER'S REPORT—*Exceptions to, etc.*—The neglect of a party excepting to a master's report to point out what the evidence is, upon the conclusions of the master, which the party disputes, renders the report of the master of no assistance to the court, and is a practice which the court is under no obligation to tolerate.

2. MASTER IN CHANCERY—*Duty When a Cause is Referred.*—Where a cause is referred to a master to take testimony and report his conclusions as to the facts, it is not proper for him to do more than he is ordered to do. It is irregular and improper to set forth the evidence in his report, without the special direction of the court.

3. HANDWRITING—*Proof by Comparison.*—In a proceeding in chancery where it was shown that a trust deed was duly proven, and that it was made by the same person whose name appears thereon as the maker of the notes, it was competent for the master to compare the signatures and conclude that the notes were signed by the person who signed the trust deed.

4. MORTGAGES—*What Matters Subsequent to the Execution Need Not be Proved.*—It is not necessary that the transfers of property subsequent to the making of a mortgage, or the interests of the defendants, or that the trustee had been applied to join with the *cestui que trust* in the filing of the bill, or the election to declare the entire amount due, should be proven.

Memorandum.—Foreclosure proceedings. Error to the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

STATEMENT OF THE CASE.

This was a bill filed July 30, 1892, to foreclose a trust deed, dated December 4, 1890, executed by William C. Brown to Alexander A. McKay, as trustee, upon certain premises described by metes and bounds, containing twenty-five acres situated in Sec. 6, T. 39 N., R. 13 east, Cook county, to secure Brown's three notes of \$6,666.66 each, payable to John A. McKay, in one, two and three years after date, with interest at six per cent, payable semi-annually, said notes covering the balance of the purchase price of said premises, conveyed by McKay to Brown December 4, 1890.

The bill alleges *inter alia*, that the trust deed provided

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54	319
151	315
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58	382
51	295
59	377
59	419
59	423
51	295
60	402
51	295
63	477

that if default should be made in the payment of said notes, or any part thereof, or the interest thereon, the whole of said principal sum and interest should thereupon, at the option of the legal holder thereof, become due and payable, and on his application it should be lawful for the trustee in his own name, or otherwise, to file a bill to foreclose, etc.; that by reason of default in the payment of a portion of the principal of the first note and the semi-annual interest due on the two remaining notes on June 4, 1892, said John A. McKay elected and declared the whole of the principal and interest of the three notes due and payable; that Brown conveyed said premises to Reynolds, December 4, 1890, subject to the lien of said trust deed, which he agreed to pay; that Reynolds conveyed to Hans P. Johnson an undivided one-fifth of said premises, March 30, 1891, subject to said trust deed, said Johnson agreeing to pay one-fifth of said incumbrance; that the conveyance to Johnson was in trust for himself and Anton J., Jennie O. and Josephine D. Johnson, said Hans P., Anton J. and Jennie O., being then minors; that on June 6, 1892, Reynolds conveyed to Brown his interest in said premises.

All but one of the adult defendants answered, admitting the indebtedness of Brown to McKay, the execution and delivery of the notes, the ownership thereof, the trust deed, default in the payment of said indebtedness, and the amount due as set forth, except the sum of \$500 for attorney's fee; that the interest in said premises of the Johnsons was correctly alleged in the bill, except that Hans P. Johnson had already paid to McKay the sum of \$1,570, and that he has always been, and now is ready and willing, and before the filing of said bill, offered to McKay to pay his share of said indebtedness at the maturity thereof upon receiving a release and discharge of his interest in said premises from the lien of said trust deed, which McKay refused.

Subsequently the adult defendants who had answered, amended their answer, denying that McKay, prior to the filing of said bill, either elected or declared the whole of the principal and interest due and payable, but averring that at

Brown v. McKay.

the maturity of said principal note and of the coupon interest notes, the time of payment thereof was extended, and that the time of such extension had not expired when the bill was filed.

The minor defendants answered through their guardian *ad litem*.

The Johnsons also filed a cross-bill, alleging *inter alia*, that Hans P. had paid his one-fifth share of said incumbrance (or \$1,570 out of the \$3,600 paid); that prior to the maturity of the principal and interest notes, he was and has since been able, ready and willing and has offered to pay his share of said indebtedness, on condition that said McKay release his interest from his said lien, but that McKay has refused the offer; and praying either for a partition of the premises or an apportionment of said incumbrance, and that upon payment of Johnson's share of the indebtedness, his share of said premises might be released from the lien of said incumbrance.

A demurrer to the cross-bill was sustained.

The cause having been referred to a master "to take proofs and report the same with his opinion on the law and evidence," the master's report was filed February 1, 1892, stating that he had taken the depositions of John A. McKay, Julius Stern and Horace White, for complainant, and Lewis Reynolds, William F. Reynolds and Hans P. Johnson, for defendants; that complainant offered also the three principal and coupon notes, and the trust deed; and from the evidence thus taken he finds that the notes and trust deed were executed at the time, in the manner, and for the purposes in the bill of complaint set forth, and are now held and owned by John A. McKay; that the principal promissory note became due and payable December 4, 1891; that the total paid on the principal thereof was \$2,400, as follows: \$900 December 9, 1891; \$500 January 15, 1892, and \$1,000 January 29, 1892; that interest on all of said three notes has been paid up to December 4, 1891; that default has been made in the payment of \$4,266.66, balance of principal on first note; that owing to such default and default in paying

interest on all the notes since December 4, 1891, the holder of said notes and trust deed elected to, and did, declare the whole amount of principal and interest on the three notes due and payable, and the same thereby became and is now due and payable; that the total amount of principal and interest due on said three notes is \$18,846.18; that complainants by the terms of the trust deed are entitled to \$500 for their solicitors' fees in this proceeding, that being a reasonable fee for the services rendered, and to be rendered in this cause, for which amount McKay has a lien on said premises, making a total of \$19,346.18; that all the material allegations in the bill are sustained by the proofs, and the prayer thereof should be granted and a decree entered in accordance therewith.

The following objections to the draft report of the master were filed, and being by him overruled, they were re-filed as exceptions to the report made to the court:

1st. For that the master has, by his report, certified that he found that the notes and trust deed in the bill of complaint herein mentioned were executed at the time, in the manner and for the purpose in said bill of complaint set forth, whereas he ought to have certified that the evidence introduced before him did not support said allegations of said bill of complaint.

2d. For that the master has, by his report, certified that owing to a default of payment of the balance of the principal due on exhibit 1, and of the interest upon all of the notes involved herein since December 4, 1891, the holder and owner of said notes and trust deed elected to, and did declare the whole amount of principal and interest of all said notes due and payable, and the same thereby became, and now are due and payable, whereas said master ought to have certified that the evidence introduced before him did not show either said election, declaration, nor the alleged fact that the whole amount of principal and interest of all of said notes thereby became, and now are due and payable; but, on the contrary, said evidence showed that said election was not made, and the privilege of election was waived, and

Brown v. McKay.

the time of payment of said first principal note and interest thereon extended by the holder and owner of said notes, which extension had not expired at the time of the filing of the bill herein.

3d. For that the master hath in and by said report certified that there is now due and owing the sum of \$19,346.18, whereas he ought to have found nothing to be now due and owing.

4th. For that the master hath in and by the said report certified that said complainant, John A. McKay, is entitled to a lien for \$500, attorneys' and solicitors' fees, whereas he should have certified that said McKay was entitled to nothing on that account.

5th. For that the master has certified in and by his said report, that all of the material allegations in the bill were sustained by the proofs; that the prayer thereof should be granted, and a decree entered in accordance therewith, whereas he should have found that none of the material allegations of said bill were sustained by the proofs, that the prayer thereof should not be granted or decree entered herein in accordance therewith.

6th. Because the master admitted incompetent testimony objected to by said defendants as shown by said report.

7th. Because the master, by his said report, has assumed to pass on judicial questions.

Exceptions to the master's report filed in court February 7, 1893, in the words and figures of the foregoing objections.

F. W. BECKER, attorney for plaintiff in error.

TATHAM & WEBSTER, attorneys for defendants in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

These exceptions require the court to search through the mass of evidence to determine if they are well taken. There is a neglect to point out what the evidence is upon the con-

clusions of the master, which the party disputes. Such a practice renders the report of the master of no assistance to the court, and is one which the court is under no obligation to tolerate. *Huling v. Farwell*, 33 Ill. App. 238; *Heffron v. Gore*, 37 Ill. App. 257. Where a cause is referred to a master to take testimony and report his conclusions as to the facts, it is not proper for him to do more than he was ordered, and it is irregular and improper to set forth the evidence in his report, without the special direction of the court. *McClay v. Norris*, 4 Gil. 370; *Daniell's Ch. Pr.* 1300; *Matter of Hemiless*, 3 Paige 305; *Mott v. Harrington*, 15 Vt. 185; *Goodman v. Jones*, 26 Conn. 264; *Gilmore v. Gilmore*, 40 Maine 53.

Either party may have from the master certified copies of such portion of the testimony as either may desire to present to the court upon the hearing of exceptions. *Hoff. Ch. Pr.* 345; *Donnell v. Columbian Ins. Co.*, 2 Sumner 366.

If, as in the present case, the court has ordered the master to return, with his report, the evidence presented before him (a practice, considering the overburdened condition of the courts, of very doubtful utility), it is yet upon the facts as found by the master that the court proceeds, if it render a decree based upon such report. If either party is dissatisfied with the master's report, exceptions may be filed thereto; if the exceptions be to findings of fact, the evidence as to such facts should be set forth or pointed out with such directness that the court may readily find the same without searching through the entire evidence. *Huling v. Farwell*, *supra*; *Heffron v. Gore*, *supra*; *Daniels' Ch. Pr.* 1300; *Story v. Livingston*, 13 Pet. 359. In the present case, the findings of the master are sufficient to sustain the decree. Appellants, in this court, urge that there was no evidence of the execution of the notes. This is a conclusion drawn by appellants from the evidence; what the evidence was they fail to point out. But, referring to the master's report, we find that the execution of the trust deed was duly proven; that that instrument was made by the same person whose name appears thereon as the maker of

Adair v. Adair.

the notes; it was, therefore, in the power of and competent for the master to compare signatures and conclude that the notes were signed by the person who signed the trust deed. Mr. McKay also testified that the notes produced before the master were those described in the bill. It was not necessary that the transfers of the property subsequent to the making of the mortgage, or the interests of the defendants, or that the trustee had been applied to to join with the *cestui que trust* in the filing of the bill, or the election to declare the entire amount due, should be proven. *Cheltenham Imp. Co. v. Whitehead*, 128 Ill. 279; 8 Eng. and Am. Enc. of Law, 193; *Harper v. Ely*, 56 Ill. 179; *Hoodless v. Reid*, 112 Ill. 105.

This writ of error is prosecuted after a sale has been made under the decree, at which sale there was realized the full amount of the decree, interest and costs. We are not aware of any authority holding that sale must be made in the inverse order of alienation, where the alienation was merely of an undivided portion of the whole.

It also appears that at the sale, any portion of the premises for which any person desired to bid was first offered; if any of the defendants wished to have first sold any particular portion, an opportunity was thus given to them; the property sold is yet subject to redemption. We find no error in the record warranting a reversal of the decree, or of any of the orders of the court below. We do find the decree to be equitable and in accordance with the law, and it, together with the order confirming the master's sale, is affirmed.

John D. Adair v. Ida B. Adair.

1. RECORD—*Absence of—Presumptions.*—In the absence of a complete record, the presumption is that the omitted portion contains that which justified the action of the court.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the

VOL. 51.]

Boddie v. Tudor Boiler Mfg. Co.

October term, 1893, and appeal dismissed. Opinion filed February 13, 1894.

The statement of facts is contained in the opinion of the court.

LUTHER LAFLIN MILLS and HOFHEIMER, ZEISLER & MACK, solicitors for appellant.

DUNCAN & GILBERT, attorneys for appellee; CHARLES W. GRIGGS, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of court directing the payment of alimony.

The clerk's certificate is that the foregoing is a "true, perfect and complete transcript of the record according to præcipe."

The præcipe calls for "original bill and answer; cross-bill and answer; appearance of W. J. Hynes, filed July 18, 1890; order entered July 3, 1891; appearance of Duncan & Gilbert, filed March 15, 1893; order entered July 14, 1893; stipulation filed August 3, 1893; order entered August 3, 1893; appeal bond.

Whether what is thus called for constitutes a complete record we do not know.

In the absence of a complete record, the presumption is that the omitted portion contains that which justified the action of the court. *Alling v. Wengell*, 46 Ill. App. 562.

The appeal will be dismissed. *Van Meters v. Lobis*, 29 Ill. 488.

Boddie v. Tudor Boiler Mfg. Co. et al.

1. GARNISHMENT—*Form of the Judgment*.—A judgment against a garnishee must be in the name of the original defendant for the use, etc. To enter it in the name of the original plaintiff is error.

2. GARNISHEE PROCEEDINGS—*The Issue, How Made*.—In garnishee

Boddie v. Tudor Boiler Mfg. Co.

proceedings the issue is made by the reply of the plaintiff to the answer of the garnishee, but the issue is as to indebtedness to the defendant.

Memorandum.—Garnishee proceedings. Error to the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

WOOLFOLK & BROWNING, attorneys for plaintiff in error.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for defendants in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The Tudor Boiler Mfg. Co. commenced an action by attachment against Osborne & Townsend, April 19, 1888. They pleaded non-assumpsit, and October 22, 1889, the parties appeared, submitted the case for trial without a jury, and judgment was entered against them for \$1,363.53.

The plaintiff in error was a garnishee, and conditional judgment was then entered against him by default, he having been served, for the same amount.

Interrogatories had been filed when the suit was commenced, and after being served on *sci. fa.*, Boddie answered them December 17, 1889. Replication to the answer was filed March 14, 1891. March 27, 1891, the garnishee proceedings were dismissed for want of prosecution on motion of Boddie, but were reinstated three days thereafter.

Then under date of June 20, 1893, the record shows this:

<p>"TUDOR BOILER MFG. Co. vs. E. F. OSBORNE & JNO. TOWNSEND.</p>	}	Attachment.
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"This cause being called for trial as to the issue against the garnishee, M. M. Boddie, came the parties by their attorneys and issues being joined, it was ordered that a jury come, whereupon come the jurors, etc. (Here follow names of jurors.)

"Being duly elected, sworn, etc., to try the issues joined and a true verdict render, etc., after hearing all the evidence

adduced say, we, the jury, find there is now due from garnishee M. M. Boddie, trustee, to defendants, Osborne & Townsend, the sum of \$5,311.59.

"Therefore it is considered by the court that the defendants, E. F. Osborne and John Townsend, for the use of the plaintiff, Tudor Boiler Manufacturing Company, as to the sum of \$1,363.63, and interest thereon upon the 22d day of October, 1889, being amount of original judgment rendered at date aforesaid, and all plaintiff's costs and charges in this as well as in that behalf expended, and as to the residue for the use of themselves, to have and recover of and from said garnishee, M. M. Boddie, the sum of \$5,311.59, so found to be due by the jury aforesaid, and have execution therefor."

What cause was called for trial? The one named in the title had ended nearly four years before. What parties came? The fair meaning is those named in the title; both interested in putting a burden, justly or unjustly, upon the plaintiff in error. It has been often decided that a judgment against a garnishee must be in the name of the original defendant for the use, etc., and that to enter it in the name of the original plaintiff is error. *C. R. I. & P. Ry. v. Mason*, 11 Brad. 525.

It follows that the cause in which such judgment is entered should be the cause of the original defendant for the use, etc., against the garnishee. *Warner v. Kendall*, 78 Ill. 598.

Although the issue is made by the reply of the plaintiff to the answer of the garnishee, yet that issue is as to indebtedness to the defendant, due or to become due when the answer was filed.

The recital upon the record that a cause not pending was called for trial, furnishes no foundation for trying an issue in another cause, and unless it clearly appear that a party to be affected by the trial of such issue participate in the trial, he ought not to be bound by the result. Nor is the verdict responsive to the issue, which was, whether the garnishee had truly answered; not what might be owing upon any cause of action more than two years thereafter. *Patterson v. United States*, 2 Wheaton, 221.

The judgment is reversed and the cause remanded.

Arcade Company v. Allen.

51	305
58	527
51	305
58	406
51	305
78	477

1. **BILLS OF EXCEPTIONS—*Objections and Exceptions—How Shown.***—Where, in a bill of exceptions, at the end of each of the questions were the words, “Objected to; sustained; exception;” *it was held* defective, as not showing who objected or what was objected to, or who sustained, or what was sustained. The persons preparing a bill of exceptions must be responsible for all uncertainty and omissions in it.

2. **BILLS OF EXCEPTIONS—*Care in the Preparation.***—More care in the preparation of bills of exceptions than merely inserting a transcript of the shorthand notes taken at the trial, is necessary.

3. **INSTRUCTIONS—*Must be in Writing.***—Under Sec. 52, Chap. 110, R. S., it is error for the court to instruct the jury orally.

Memorandum.—Assumpsit. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 13, 1894.

The statement of facts is contained in the opinion of the court.

ARTHUR B. WELLS, attorney for appellant.

CHARLES E. POPE, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellees sued for money due them on a building contract, and presented a final certificate from a superintending architect, pursuant to the contract between the parties.

The appellant vainly attempted to show on the trial that faults were in the work, undiscoverable at the time the certificate was issued, but developed when water was let into the pipes in the building, for which deductions should be made.

If the defense had been proved, it would have made out a mistake in the certificate for which proper allowance ought to be made. The court refused to admit the evidence, but the bill of exceptions is not sufficient to show error in that particular.

At the end of each of the questions are the words "Objected to. Sustained. Exception." Who objected to what? Who sustained what? Who excepted to what? The reiteration by this court, over and over, of the doctrine of *Rogers v. Hall*, 3 Scam. 6, that "the appellant must be responsible for all uncertainty and omission in his bill of exceptions," is unheeded. More care in the preparation of bills of exceptions than merely inserting a transcript of the shorthand notes taken at the trial, is necessary. At the close of the evidence, the record shows further proceedings, thus:

"The Court: Now, gentlemen, let me say to you that if ever there was an imposition perpetrated on a court, it was in the trial of this case. When I let you go on with this trial, I imagined that you had some defense showing injury to your building. You have taken the time of this court and cost the county of Cook over \$200, and I have no way to punish you for doing it. You have imposed on the intelligence of the jury. So far as the court is concerned, I care nothing, but if you can show \$1 damage arising from the driving of the nail in this pipe, I will allow you to do it, but you have kept me here two days and have not shown it, and it is an imposition on the intelligence of the jury when you do not show a cent, one cent, of damages: When a man comes into court as defendant or as plaintiff, he must prove something. It appears to me to be a willful and malicious attempt on the part of the defendant to delay the recovery of a just judgment in this case. The contract appears to have been completed in time; for all I know, the property was taken possession of, a note was given to the architect, a final certificate on the completion of some minor defects, that it appears was complied with, nailing down some floors, a hole in the lead pipe was stopped. The only evidence of damage to the building was that one of the defendants came here and swore that he noticed moisture on the ceiling, and on the plaster. Now I venture to say that there never was a building in this city where less damage was suffered by the owner than in this case. You have no case. I say it is an imposition.

North Chicago St. R. R. Co. v. Wrixon.

Mr. Cleveland: Note an exception to the remarks of the court. I have entered up my instructions, your honor, and I desire to be heard.

(Addressing counsel:) I do not desire to hear anything more from you. (Addressing the jury:) You will find a verdict for the plaintiff of \$827.20.

Mr. Cleveland: If the court please, I would like to say that, in the first place, we were brought in here without any copy of the counts. I knew nothing about the case in the first place, but I believe as a matter of law we have a good defense, and as for imposing on the court, I disclaim any such intention, and I desire to be heard before the jury.

The Court: No, sir.

Mr. Cleveland: Well, I have acted in good faith in this matter.

The Court: Well, it don't appear so. You have not proved one cent; you will admit that yourself.

Mr. Cleveland: We don't have to prove it. We claim simply this: It was their place to show a final certificate that was issued without fraud or mistake. There was a mistake.

The Court: Now the jury can sign that verdict."

Here the appellant preserved a proper exception to the action of the court. Sec. 52, of Ch. 110 Practice Act, of 1872, is: "Hereafter, no judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing."

And the next preceding section is, "The court, in charging the jury, shall only instruct as to the law of the case."

The judgment is reversed and the cause remanded.

North Chicago Street Railroad Co. v. Wrixon, Administrator, etc.

1. CARRIERS OF PASSENGERS—*Failure to Stop When Requested.*—For whatever damage a passenger may sustain from a failure to stop a street car at a proper place when properly requested, such failure being the proximate cause of the injury, a recovery may be had.

51	307
51	424
150s	532
51	307
67	682
51	307
64	166
51	307
68	561
51	307
72	64
51	307
77	177

51	307
98	5
51	307
101	7487
51	307
199s	522

2. CARRIERS OF PASSENGERS—*Immediate Causes of Accidents.*—If another cause, for example jumping from a car when in motion, intervenes between the negligence of the driver in not stopping the car when requested, and the injury complained of, there can be no recovery.

3. STREET RAILWAYS—*Failure to Stop the Car.*—Where the negligence relied upon is a failure of the driver to stop the car when requested, and the train of events, from the failure to stop the car to the accident, is not the natural or necessary sequence of the act of the driver in not stopping his car, there can be no recovery.

4. STREET RAILWAYS—*Negligence—Breach of Duty.*—The breach of duty upon which an action for an injury can be maintained must be the proximate cause of the damage to the plaintiff.

5. STREET RAILWAYS—*Diligence for the Safety of Passengers.*—A street railway company, being a common carrier, is bound to exercise the highest diligence for the safety of its passengers, while riding, getting off and getting on its cars. In the providing of appliances for the safety of its passengers, it is bound to make use of such well known and approved means as are reasonably consistent with its condition, the business it is doing, and its duty to the public.

6. COMMON CARRIERS—*Duty Toward Passengers.*—It is the duty of a common carrier to be diligent in providing for the safety of its passengers, and it is *prima facie* liable for injuries happening to them on account of any negligence by it, they being at the time of such injury in the exercise of ordinary care and in observance of its rules.

7. DAMAGES—*Power of the Jury—Review.*—It is the rule in this State that in actions for personal injuries for negligence the jury may give damages without evidence as to the pecuniary loss sustained, yet it is not the law that the conclusion of the jury in this regard is beyond review.

8. DAMAGES.—In an action for damages in case of death by negligent act, the defendant is liable only for the pecuniary loss sustained by the next of kin. Pain and anguish of the next of kin are not a proper element of recovery.

9. DAMAGES—*\$5,000 Excessive.*—A boy ten years of age was riding on a street car. He told the conductor that he wanted to get off at the next street corner. The car did not stop and he jumped, swung or stepped off; in so doing he slipped and fell, the car passed over his leg, inflicting injuries from which he died. Suit being brought by an administrator, the jury returned a verdict for the plaintiff of \$5,000. Held, that the damages were excessive.

Memorandum.—Action for negligence. In the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed January 11, 1894.

North Chicago St. R. R. Co. v. Wrixon.

STATEMENT OF THE CASE.

On the 17th day of August, 1890, William Wrixon, a boy about ten years of age, was a passenger on one of appellant's cars. The car was proceeding southward on Evanston avenue. Just after it arrived at the Addison avenue crossing, the deceased said to the conductor, "I want to get off at the church;" when the car was between Addison avenue and Gary place, the deceased said "Let me off at the church." The church was about seventy-five feet south of Addison avenue.

The car did not stop and the deceased jumped, swung or stepped off; in so doing he slipped and fell so that the car passed over his leg, inflicting injuries from which he died.

Suit being brought by an administrator appointed, the jury returned a verdict for the plaintiff of \$5,000, and there was judgment for that sum.

APPELLEE'S BRIEF, ARNOLD HEAP AND ROSENTHAL & HIRSCHL;
ATTORNEYS.

The driver was negligent in not stopping the car. The instructions leave this to the jury, and they are conceded correct. *Crissey v. Hestonville Ry. Co.*, 25 P. F. Smith (Pa.) 83; *R. R. Co. v. Hassard*, 75 Pa. St. 367.

The company was negligent in not having fenders around the wheels of the car. *Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. 310; 3 E. D. Smith, 71.

Whether the boy was negligent is for the jury and not for the court. *Lake Shore v. Johnson*, 135 Ill. 641; *City v. Keefe*, 114 Ill. 222; *Quincy, etc., v. Gruse*, 38 Ill. App. 212; *N. C. S. R. Co. v. Williams (Ill.)*, 29 N. E. Rep. 672; *C. & A. R. R. v. Fisher (Ill.)*, 31 N. E. Rep. 406.

Rule of negligence, as a matter of law, is different with regard to children from what it is as to adults. *R. R. Co. v. Gladmon*, 15 Wall. 401; *R. R. Co. v. Stout*, 17 Wall. 657; *City v. Keefe*, 114 Ill. 222.

If the injury was caused by defendant's negligence, combining with an accident on the part of the boy, the defend-

ant is liable. *Joliet v. Verley*, 35 Ill. 58; *Lacon v. Pace*, 48 Ill. 499; *Joliet v. Shufelt* (Ill.), 32 N. E. 969.

In this case there is the loss during eleven years of minority, the loss thereafter to father and mother, the loss to each of three brothers and three sisters, all in the aggregate, \$5,000. Will this court say that it is "clearly convinced" that this award is "grossly disproportioned to the loss sustained?" *Harkins v. P. P. C. C.*, 52 Fed. Rep. 724.

Instances may be given of other awards, sustained in cases where the facts were not so strong as in the case at bar. Five thousand dollars (statutory limit), girl, six years old, daughter of a market gardener. *Houghkirk v. President, etc.*, 92 N. Y. 219. Two thousand dollars, boy, one year old. *Chicago, etc. v. Wilson*, 35 Ill. App. 346. Three thousand seven hundred and fifty dollars, bachelor, thirty years old, no persons shown to have been receiving assistance. *Ill. C. Ry. Co. v. Barron*, 5 Wall. 90. Five thousand dollars, laborer in boiler shop, thirty-six years old; had accumulated no estate; amount earnings not shown; was supporting wife and child. *B. & O. v. Kelly*, 24 Maryland 271. Five thousand dollars, unmarried, twenty-one years old; earning twenty-five dollars per month; relatives in Germany. *Bierbauer v. N. Y. Central*, 15 Hun, 559; affirmed 77 N. Y. 588.

APPELLANT'S BRIEF, EGBERT JAMIESON AND EDMUND FURTHMANN, ATTORNEYS.

There is no evidence in the case tending to show that the boy was, or ever would be able to earn an amount equal to the interest on the amount of the verdict. The jury had no right to find arbitrarily that the death of a boy results in a pecuniary loss to those entitled under the statute to the full extent of the statutory limit. The verdict, rendered without evidence as to his earning power or capacity, and for the largest amount provided by law, bears unequivocally the marks of being the result of prejudice and passion. *Ill. C. R. R. Co. v. Weldon*, 52 Ill. 290; *City of Chicago v. Scholten*, 75 Ill. 469; *Chicago & A. R. R. Co. v. Becker*, 76 Ill. 25;

North Chicago St. R. R. Co. v. Wrixon.

Quincy Coal Co. v. Hood, 77 Ill. 68; Rockford, Rock Island & St. Louis R. R. Co. v. Delaney, 82 Ill. 198; Chicago & A. R. R. Co. v. Becker, 84 Ill. 483; Andrews v. Boedecker, 17 Ill. App. 218; Chicago E. & L. S. Ry. Co. v. Adamick, 33 Ill. App. 414.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Two acts of negligence are charged in the declaration, viz.: that defendant's driver failed to stop its car, as requested, at the intersection of Addison street and Evanston avenue; and that the deceased, while with due care and diligence endeavoring to alight from the car, was thrown to the ground and injured by reason of the negligence of appellant in failing to properly equip its cars with safety guards and appliances.

As to the alleged negligence in failing to stop its car when requested, the court is unitedly of the opinion no recovery can be had in this case. For whatever damage a passenger may sustain from a failure to stop a street car at a proper place when properly requested, such failure being the proximate cause of the injury, a recovery might be had. In the present case between the negligence of the driver and the injury to plaintiff's intestate there intervened another cause, without which the accident would not have happened; that intervening cause was the act of the deceased in jumping from the car while it was in motion.

The train of events, from the failure to stop the car to the accident, was not a natural or necessary sequence from the act of the driver in not stopping his car.

Nor was the jumping from the car, so far as is shown by the evidence, a thing which the defendant can be presumed to have known would follow the failure to stop.

The breach of duty upon which an action for injury can be maintained must be the proximate cause of the damage to the plaintiff. I. B. & W. Ry. Co. v. Birney, 71 Ill. 392; Shearman & Redfield on Negligence, Secs. 8, 25 and 26; Schefer v. Ry. Co., 105 U. S. 249; Kirtner v. Indianapolis, 100 Ind. 210; Philadelphia R. Co. v. Boyer, 97 Penn. St. 91.

APPELLATE COURTS OF ILLINOIS.

North Chicago St. R. R. Co. v. Wrixon.

The principle applicable in such cases is "*In jure non re, sed in proxima spectatur.*" In law the immediate, proximate cause of any event is regarded. As to the negligence in not having upon the car proper guards, the appellant, being a common carrier, is bound to exercise the greatest diligence for the safety of its passengers, while getting on and getting off its cars. In the providing of appliances for the safety of passengers, it is bound to make use of such well known and approved means as are reasonably consistent with its condition, the business it is doing, and its duty to the public. *Smith v. New York & Harlem Ry. Co.*, 19 N. Y. 127; *Hegeman v. Western Ry. Corporation*, 3 Ker. 9; *Hutchinson on Carriers*, Sec. 529; *Toledo, etc., R. R. Co. v. Conroy*, 68 Ill. 560.

The Supreme Court of this State, in *North Chicago St. Ry. Co. v. Williams*, 29 N. E. 672, held that whether a plaintiff, in getting upon a horse car while it is in motion, is or is not in the exercise of due care, is a matter for the determination of the jury under all the circumstances of the case. Such being the rule—whether the deceased was in the exercise of ordinary care in getting off the car while it was in motion, and whether there were well known and approved appliances (guards) which, if in use, would have prevented the injury to the plaintiff, and whether the use of such guards was reasonably consistent with the condition of appellant, the business it was doing and its duty to the public, were all questions to be submitted under proper pleadings and instructions to the jury.

It is the duty of a common carrier to be diligent in providing for the safety of its passengers, and it is *prima facie* liable for injuries happening to them on account of any negligence by it; they being at the time of such injury in the exercise of ordinary care and in observance of its rules. If, then, it be not negligence for a passenger to get off a moving street car, and not a violation of its rules, it is the duty of the carrier to be diligent in so equipping its cars that he may not be injured in so alighting. The amount of the verdict and judgment in this case can not be justified. The

defendant is liable only for the pecuniary loss sustained by the next of kin. Neither five nor fifty thousand dollars would be an adequate compensation for the pain and anguish of the parents of this boy; with this we have nothing to do. While it is the rule in this State that in this class of cases the jury may give damages without evidence as to the pecuniary loss sustained, yet it is not the case that the conclusion of the jury in this regard is beyond review. We can not say, and we do not think, that the jury thought that the pecuniary loss alone to the next of kin of deceased was five thousand dollars. It is doubtful if, in one case in a thousand, the bare pecuniary loss suffered by the next of kin from the death of a boy of ten years, is five thousand dollars; in very many instances like this, while there is the keenest anguish, there is no pecuniary loss whatever. In no such case as this has a judgment of this magnitude been sustained by the Supreme Court. The judgment of the Circuit Court is reversed and the cause remanded.

MR. JUSTICE GARY.

I agree to the reversal of the judgment, but not for the reason assigned in the foregoing opinion. Notwithstanding the decision of this court in *Adamick v. Chicago E. & L. S. Ry.*, 33 Ill. App. 412, and the authorities there cited, and my own apparent assent thereto in *Chicago M. & St. P. Ry. v. Wilson*, 35 Ill. App. 346, I yet believe that the legislation of this State commits to the uncontrollable caprice of the jury the amount of damages, not exceeding \$5,000. It is all guess work; *Railroad Co. v. Barron*, 5 Wallace (S. C.) 90; and what is there said about "good sense and sound judgment," only gives a respectful name to the disposition of juries to make railroads smart.

Negligence is the omission to discharge some duty, whenever the negligence consists in omission. No duty, no negligence.

Duty is an inference of law. I undertake to say that no declaration can be drawn, which will show a duty of a street railway company to adopt precautions for the safety of

passengers who jump, with or without notice, from a car, without any express or implied assent of the railway company while the car is moving in the ordinary course of its journey. Probably the next case where such a passenger has been bruised by the guard that a railway may have adopted, will be put upon the claim that he was outside the rail so that a wheel would not have touched him, but the projecting and improper guard was the cause of his hurts.

I think the cause should be remanded accompanied by an opinion that will prevent any holding on another trial, that it was the duty of the appellant to take care of the deceased when he jumped off.

MR. PRESIDING JUSTICE SHEPARD.

I think the judgment ought to be affirmed.

Sheldon et al. v. Weeks et al.

51	814
105	564

1. EQUITY JURISDICTION.—*Violation of Ordinances*.—Courts of equity do not interfere to enforce by injunction the observance of city ordinances prohibiting the erection of buildings not nuisances *per se*.

Memorandum.—Application for an order containing an injunction pending an appeal. Heard in this court at the October term, 1893, and denied. Opinion filed October 19, 1893.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Application is made in this cause to continue, pending the appeal, an injunction granted by the Circuit Court upon the filing of a bill by appellants, which injunction restrained appellees from constructing or keeping a livery stable in a certain alleged residence neighborhood of the city of Chicago. The defendants answered, denying that they were erecting a building to be used for a livery stable, alleging that the structure was designed to be used for a carriage repository and boarding stable.

Cors v. Tompkins.

It is urged that the building is being constructed in violation of an ordinance of said city. Courts of equity do not interfere to enforce by injunction the observance of city ordinances, prohibiting the erection of buildings not nuisances *per se*. President and Trustees v. Moore, 34 Wis. 34; Mayor v. Thorne, 7 Paige, 261; Village of St. Johns v. McFarlan, 33 Mich. 72.

Courts may and often do restrain the creation of nuisances, but it can not be known in advance that this stable will be a nuisance. Many private stables are kept in the best residence neighborhoods. If this contemplated stable shall be kept so as to be a nuisance, a court of equity may then interfere.

The Circuit Court having, upon motion, dissolved the injunction granted upon the filing of the bill, upon a cross-bill filed by the defendants, enjoined the complainants in said original bill from prosecuting any other suit or suits for the purpose of hindering or delaying the defendants thereto in the erection of said building, and from interfering with its construction; from this injunction no appeal appears to have been taken.

The application to continue the injunction granted upon the filing of the original bill is denied.

Cors v. Tompkins.

51	315
54	340
51	315
52	300

1. INJUNCTION—*Damages on Dissolution*.—The question to be determined, is the damage suffered because of the injunction. The necessary and actual cost of removing the same is the real damage. An allowance for attorney's fees for services in the Appellate Court after the injunction has been terminated by an order of the court below is improper.

2. INJUNCTION—*Dissolution—Damages—Services of Solicitor*.—It is not merely what the services of the solicitor were reasonably worth that is to be found, but for what sum the party has been reasonably and fairly made liable, or what he has reasonably and fairly paid.

3. INJUNCTION—*Dissolution—Damages—Solicitor's Fees—Agreement*.—Where there was an agreement with an attorney to prepare and argue a motion to dissolve an injunction for the sum of \$100, that being the extent

of the damage, the defendant can not recover \$200, although the attorney's services might have been worth that sum.

Memorandum.—In chancery. Appeal from an order of the Superior Court of Cook County awarding damages upon the dissolution of the injunction; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 18, 1894.

The statement of facts is contained in the opinion of the court.

KELSEY & LAZARUS, attorneys for appellant.

WM. R. BURLEIGH, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of court awarding damages upon the dissolution of an injunction. The damages claimed were for expense incurred in the employment of attorneys. Among the services rendered by appellee's attorneys were certain appearances and arguments in this court, upon an appeal from the order of dissolution.

We do not think that an allowance can be made for service here rendered after the injunction has been terminated by an order of the court below. Nor do we think that the evidence presented in this case as to the liability of or payment by the appellee for the amount awarded by the court was sufficient. It is not merely what the services of the solicitor were reasonably worth that is to be found, but for what sum has the party been reasonably and fairly made liable, or what has he reasonably and fairly paid; the thing to be determined is the damage he has suffered because of the injunction; the necessary and actual cost of removing the same is damage.

If there was an agreement with an attorney to do all that he could, or to prepare and argue a motion to dissolve for the sum of \$100, that being the extent of the party's damage, he could not recover \$200, although the attorney's serv-

Robinson v. Robinson.

ices might have been worth that sum. It is necessary that courts should be particular about matters of this kind. *Jevne & Almini v. Osgood et al.*, 57 Ill. 340; *Elder et al. v. Sabin et al.*, 66 Ill. 126; *Harms, Impl'ed, etc., v. Fitzgerald*, 1 Ill. App. 325; *Gerard v. Gateau*, 15 Ill. App. 520-530; *McGouwn v. Law*, 18 Ill. App. 34-38; *Stinnett v. Wilson*, 19 Ill. App. 38-41.

The judgment of the Superior Court is reversed and the cause remanded.

May Robinson v. Martha J. Robinson.

1. **DEATH—Presumption of.**—A presumption of death arises from a continuous absence abroad for seven years, during which time nothing is heard of the absent person by those who would naturally have heard from him if alive. From non-claimer of rights or exposure to peculiar sickness, death at an earlier period may be inferred.

2. **BURDEN OF PROOF—Prima Facie Evidence of Existing Right.**—Where there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person calling such right in question.

3. **EVIDENCE—Facts Within a Person's Knowledge.**—When a fact is peculiarly within the knowledge of a party, the burden is on him to prove such fact, whether the proposition be affirmative or negative.

Memorandum.—Forcible detainer. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

STATEMENT OF THE CASE.

Martha J. Robinson, in her own right and as guardian of Curtis E. Robinson, Jr., and Bessie L. Robinson, minors, filed a complaint in forcible detainer against "M. L. Wilson."

Summons having been served, appellant filed, by the name of May Robinson sued as M. L. Wilson, a verified plea, setting forth that before the bringing of this suit, she had

51 317
86 379

brought her bill in the Superior Court to assign to her a dower in the said premises, and that the said premises might be held and decreed to be her homestead; and that the plaintiffs in this suit are defendants in the said suit in the Superior Court; a demurrer to this plea was sustained, whereupon appellant, by the name of May Robinson, sued as M. L. Wilson, filed a plea of not guilty.

Upon the trial N. S. Robinson, an uncle of the plaintiffs, testified that on May 1, 1892, he was acting for the plaintiffs, and about that time went to the premises and demanded of appellant the rent; that she replied that as soon as he gave her a lease for three or four years she would pay the rent; otherwise not; that he told her if she did not pay the rent he would give her five days' notice, and turned to leave the room; that she called him back and paid \$250, the rent for May; that he collected the rent in June, July, August, September and October, and \$65 on the November rent. That \$185 of the November and \$250, the December rent, was not paid; that he formerly collected the rent of these premises for his brother, C. E. Robinson.

The defendant, appellant, introduced a lease for the premises from C. E. Robinson to her, running from September, 1891, to April 30, 1892, with the privilege of extending the lease one or five years, with satisfactory securities for the payment of the rent.

Martha J. Robinson testified that her father, C. E. Robinson, died April 20, 1892, leaving the plaintiffs his only children; that her mother was then dead; that from her mother she had heard that she had a step-brother, who went South when the yellow fever was prevalent, and that it was supposed that he died; that she never heard her father speak of him; that her mother, his step-mother, said his name was Fred; that she, witness, had never seen him; that she went away from home when she was six years old and remained until she was twelve, being now twenty-two; that the last Saturday, before, two men, perfect strangers, came to her house and said they had seen a step-brother of hers in jail in Salt Lake City, and that they would put her in communica-

Robinson v. Robinson.

tion with him if she wished; that she told them "if he wished to hear of us he should write to us;" that she asked them how old a man he was, and they said his hair was cut; they did not tell his age; that she was subpoenaed by the defendant.

The jury found the defendant guilty and judgment being rendered for the plaintiffs, appellant prosecutes this appeal.

LAWRENCE P. BOYLE and C. STUART BEATTIE, attorneys for appellant.

SCHINTZ & IVES, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged that under the evidence as to the existence of an heir of C. E. Robinson, not one of the plaintiffs, this judgment for the possession of the entire premises can not be sustained. The testimony that the three plaintiffs are the three children of C. E. Robinson, is clear. The evidence that there is or ever was another child, is vague and most unsatisfactory.

The witness, Martha Robinson, testified that she had for ten years prior to her father's death lived here; that she had never heard her father speak of this supposed child, and her mother had spoken of him only as a child by a former wife, who had gone South many years ago and was supposed to have died. It does not appear that the mother had ever seen her supposed step-son, or upon what information she spoke of such a person.

Thus the evidence derived from the family of the existence at any time of another child, is not only a mere statement of one whom it is not shown ever knew, or was informed by any one who did know, about such matter, but the evidence of existence is coupled with the same class of evidence of his death. A presumption of death arises from a continuous absence abroad of seven years, during which

time nothing is heard of the absent person by those who would naturally have heard from him, if alive. From non-claimer of rights or exposure to peculiar sickness, death at an earlier period may be inferred. Wharton on Evidence, Secs. 1274 and 1277; *In re Hutton*, 1 Cust. 575; *Taylor on Ev.*, Sec. 158; *Rex v. Harbone*, 2 A. & E. 544; *Doe v. Griffin*, 1 East, 293.

The testimony as to two men having, just before the trial, called and stated that they had seen in jail, in Salt Lake, a step-brother of the plaintiffs, we do not regard as establishing anything material.

In considering evidence of this kind courts adopt the conclusion which appears to rest on the most solid foundation. *Johnson v. Todd*, 5 Beavan, 509, 600.

That these men knew anything about what they spoke of is not shown; no satisfactory reason for their appearance or disappearance appears. At the most this is but a rumor from an unknown source.

C. E. Robinson had been, at the trial of this cause, dead for nearly a year. He left, it appears at least, one piece of real property, bearing a rental of \$3,000 per annum. He left no will. If he has a living son in jail in Salt Lake or elsewhere, of whom his daughter, living with him for more than ten years, never heard him speak, it is in every respect probable that ere this, such son, or some one representing him, would have appeared to claim a share of her estate.

Appellant, by the payment of rent under threat of expulsion, after the death of C. E. Robinson and after the expiration of her lease, attorned to the plaintiffs. See *Voight v. Resor*, 80 Ill. 331.

She, leasing this property as M. L. Wilson, filed in this case her plea in the name of and verified as "May Robinson." In this plea, under oath, she sets forth that she had filed and pending in the Superior Court her petition for dower and the setting off of a homestead in the premises in controversy; and that the defendants (the heirs of C. E. Robinson) are defendants thereto.

The inference from this is that she is claiming to be the widow of C. E. Robinson; if so, she can hardly have failed to

Bonney & Bonney v. Ketcham.

know that he was dead when she paid the rent from May to November, 1893, more than \$1,500; and she can hardly have failed to know that the plaintiffs were his children and heirs and the persons for whom their uncle was collecting the rent. She does not appear to have made the supposition heir a party, or to have been concerned on his account. At least if she did not know aught of this, it is singular that at the trial of this cause she did not appear and so testify.

Where there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person calling such right in question. Wharton on Evidence, Sec. 367; Banbury Peerage Case, 1 S. & S. 155.

When a fact is peculiarly within the knowledge of a party, the burden is on him to prove such fact, whether the proposition be affirmative or negative. Great Western R. R. Co. v. Bacon, 30 Ill. 347; Germ. Fire Ins. Co. v. Klewer, 129 Ill. 599; Loomis v. Green, 7 Greenl. 386; Cortigan v. Mohawk R. Co., 2 Denio, 609; Finn v. Wharf Co., 7 Cal. 253.

The judgment of the Circuit Court is affirmed.

Bonney & Bonney, Copartners, v. Ketcham, Surviving Partner, etc.

1. **DECREES**.—*Must be Based upon the Pleadings.*—A decree must be warranted by the pleadings.

2. **MECHANICS' LIENS.**—*Personal Decrees.*—Upon a petition for a mechanics' lien, a personal decree against parties who did not incur the indebtedness, can not be sustained.

Memorandum.—Mechanics' lien proceedings. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed December 21, 1893.

The opinion states the case.

LYMAN M. PAINE, attorney for appellants.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In this case appellee filed in the court below a petition for a mechanics' lien, which was duly answered. Afterward a stipulation was filed in said cause to the effect that whereas, a suit at law brought by appellee against appellants was pending, which suit was "for the same claim" as the petition, "one being by way of assumpsit, and the other by way of lien upon the property described in the petition, therefore both causes should be heard together and such decree entered in said respective causes" as should be legal and equitable. Upon the hearing, it appeared and the court found that the materials furnished, for which the lien was claimed, were not supplied to or upon the credits of appellants; it also appeared at the hearing that the contractor to whom the materials were furnished had made certain assignments to appellants in trust for appellee and others, and that there was in appellants' hands under such assignment the sum of \$242.08, in trust for appellee; the court therefore, finding that the petitioner was not entitled to a lien as prayed, rendered a personal decree against appellants in favor of appellee for \$242.08, and ordered that appellee have execution therefor.

It is doubtless the case that this decree was prepared by counsel and presented to the chancellor as in accordance with a finding he had announced, and was by him signed, without his intention having been called to the fact that there is no pleading warranting any such decree. The pleadings in the case at law are not shown; if sufficient, the court might have entered a judgment in that case, in effect the same as this decree; and if there were any pleading asking for the enforcement of the trust shown to exist, this decree might be sustained; but upon a mere petition for a mechanic's lien, which is denied, this personal decree against parties who did not incur any indebtedness because of the furnishing of the materials supplied, can not be maintained.

The decree of the Circuit Court is therefore reversed and the cause remanded.

Calumet Furniture Co. v. Reinhold.

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51	343
186	114

51 323
110 *165

1. ASSIGNMENT OF ERROR—*Excessive Damages.*—The fact that the damages were excessive not having been assigned as one of the causes in a motion for a new trial, it can not be assigned for error. The Appellate Court sits only to review the proceedings of courts, and not in the first instance to correct improper findings of juries; and unless the court was asked to set aside the verdict because of the alleged excessive amount thereof, it could and would not commit any error in not setting it aside for such reason.

2. MOTION FOR NEW TRIAL—*When Abandoned.*—When counsel neglect to argue a motion for a new trial, such motion may be considered as abandoned.

3. ERRORS—*Assignment Abandoned.*—Errors assigned in this court, if not argued, may be treated as abandoned.

4. APPELLATE PROCEEDINGS—*Errors to be Pointed Out.*—The proper conduct of business, as well as the interests of justice, require that the attention of the trial court should be specifically called to errors it is alleged to have committed, and to all grievances which a party believes he has suffered at its hands.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

EDWARD OWINGS TOWNE, attorney for appellant.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant, having a chattel mortgage upon certain household furniture purchased from it by appellee, upon default in the payment of one of the secured notes, seized the said goods, and after advertisement, sold them at public auction to a Mr. Brown for \$75, which was all the goods were shown to be worth.

There was, before the foreclosure sale, due from appellee the sum of \$64.50. Appellant, after the foreclosure sale, purchased from Brown a portion of the goods; what por-

tion was not shown, nor was it shown how much appellant paid for what it so bought.

It did not appear that there were any expenses attending the foreclosure.

Appellee testified that she had paid to appellant \$91 on the furniture, and the jury gave her a verdict for that sum, upon which there was judgment.

Appellee was, under the evidence, clearly entitled to a verdict for \$10.50.

A majority of the court are of the opinion that, it not having been assigned in the motion for a new trial that the damages allowed by the jury were excessive, the judgment should be affirmed; as this court sits only to review the proceedings of courts, and not in the first instance to correct improper findings of juries, and unless the court was asked to set aside the verdict because of the alleged excessive amount thereof, it could and would not commit any error in not setting it aside for such reason.

The writer of this opinion is inclined to think that the assignment that the verdict was against the evidence was sufficient in this case to raise the question of excess in the amount of damages awarded; that there is a distinction between motions for new trial in cases wherein the amount of damages to be awarded is in the discretion of the jury, and causes where the damages are a matter of computation.

It appears that the motion for a new trial was not argued. Such being the case the judgment should be affirmed. As before stated this court sits only to review the action of courts. When counsel neglect to argue a motion for a new trial, such motion may be considered as abandoned.

Errors assigned in this court, if not argued, may be treated as abandoned. *W., St. L. & P. Ry. Co. v. McDougal*, 113 Ill. 60; *Bergman v. Bogda*, 46 Ill. App. 351.

It is not just to parties who have obtained judgment to let a motion for a new trial go by default, and then appeal from the judgment rendered upon such default. The proper conduct of business, as well as the interests of justice, require that the attention of the trial court should be spe-

Chicago Consolidated Bottling Co. v. McGinnis.

cifically called to errors it is alleged to have committed, and to all grievances which a party believes he has suffered at its hands.

Nor should this calling of the attention of the trial court be done in a mere perfunctory way. It is for the interest of not only the litigants, but of the public, that causes, as far as possible, be finally disposed of in the *nisi prius* courts.

The judgment of the Circuit Court is affirmed.

Chicago Consolidated Bottling Co. v. McGinnis.

1. NEGLIGENCE—*Question of Duty*.—The law does not require that the drivers of vehicles in the public streets, who may have stopped in their way, must, before starting, take such measures as are reasonably necessary to ascertain whether children have so attached themselves to the vehicles as to be hurt if the vehicles move.

2. APPELLATE COURT PRACTICE—*Lost Instructions*.—The Appellate Court can not pass upon instructions unless all the instructions given upon both sides are shown in the record. Where those of one party are lost, the court will presume that all the law in the refused instructions applicable to the case was in the lost ones.

Memorandum.—Action for injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

JAMES MAHER and DUNCAN & GILBERT, attorneys for appellant.

BLACK & FITZGERALD and A. B. CHILCOAT, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. In June, 1890, the appellee, a child of seven years, was injured by falling from and being run over by a "pop

51	325
58	263
51	325
58	39

wagon," the property of, and driven by a servant of, the appellant.

The facts are that the wagon had stopped in front of a house, No. 550 West Ohio street, and the fourth house west of Wood street. The home of the child was at No. 553, nearly opposite. House No. 550 was the home of the mother-in-law of the driver of the wagon, and his wife was there. He left the wagon and went into the house, and remained, as a witness says, ten or twelve minutes.

There was a "helper" to the driver, but whether he also went into the house or remained on the wagon is disputed.

One woman testified that he went into the house; both the driver and the helper say he did not, and the helper says that he remained at the wagon arranging the bottles.

It must be taken as true on the record that the child, with others, was playing about the wagon, and that when the driver returned and started off at considerable speed, the child was upon a hanging step on the side of the wagon. There is nothing in the case showing that either of the men had notice that the child was there, though they might readily have seen him.

The conflict of evidence was for the jury to decide, and if both men left the wagon for several minutes unattended, and unsecured in any way by fastening the horses—then if the child were injured as a consequence, the case would, as to those features, be within the doctrine of *Lynch v. Nurdin*, 1 Q. B. 29 (1 Ad. & El. N. S.) 41 Eng. C. L. 422, often cited with approval by the Supreme Court. See the case stated in *Weick v. Lander*, 75 Ill. 93.

It appears that the route over which the duty of the driver would take him did not extend to No. 550 West Ohio nor west of Wood street—but that this was not the only time he went to his mother-in-law's. Now, there are two objections to a recovery upon this state of facts.

First. The injury was not a consequence of leaving the wagon unattended.

In *Lynch v. Nurdin*, and cases of the same principle, the wrong was held to be in neglect of precautions, whereby

conditions were created under which the acts of strangers inflicted the injury.

The fastening of the team, which would have prevented the injury in those cases, would have had no influence in this; the climbing by the child upon the step was wholly independent of that incident.

Second. If it were, the act of so leaving it was performed while the wagon was diverted from the business of the appellant, and used to promote the pleasure of the driver. If we assume that, notwithstanding his departure from his route, injuries inflicted by him while driving, resulting from his manner of driving, would have charged the appellant as being within the scope of the employment of the driver or his discretion as to route, no such assumption can be made as to the act of abandoning temporarily the service of the appellant and leaving the property of the appellant without care.

It would be a vain effort to attempt to reconcile the multitude of cases. The text books cite them. *Shear. & Red., Negl.* p. 146. The rule is familiar. The difficulty is in the application. *C., B. & Q. R. R. v. Epperson*, 28 Ill. App. 72.

If this judgment can be sustained, it must be upon the ground that the law raises a duty, the omission to perform which is negligence.

That duty would be that the drivers of vehicles in the public streets, who have stopped in their way, must, before starting, take such measures as are reasonably necessary to ascertain whether children have so attached themselves to the vehicles as to be hurt if the vehicles move.

There is no such law.

It would be more impracticable, applied to ordinary vehicles, than to railway tracks or cars in public streets, and it don't exist as to them. *Chi. & Alton R. R. v. McLaughlin*, 47 Ill. 265.

We can not pass upon the instructions asked by the appellant and refused by the court. Those given for the appellee are lost, and we must presume that all law in the refused instructions applicable to the case was in the lost ones. *Matson v. Lally*, 37 Ill. App. 484.

The judgment is reversed and the cause remanded.

Dale v. Davis.

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150 230
51 328
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63 495
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84 609
51 328
190 425

1. REDEMPTION—*Equity of—Rights of the Owner.*—On the satisfaction of a decree by a sale of premises in foreclosure proceedings, the owner of the equity of redemption in the premises sold, at the time of the sale, and continuing to be such until the time for redemption expires, is entitled to the possession of the premises and the rents and profits arising therefrom during the period of the right of redemption.

2. REDEMPTION—*Premises in Possession of a Receiver.*—Where premises sold under a decree in foreclosure are in the possession of a receiver, such possession must be considered as for the benefit of him who has the right of possession, and he should not be allowed to destroy or impair such right during the period of redemption.

3. TAXES—*Receiver in Possession of Mortgaged Premises.*—A receiver in possession of premises pending foreclosure proceedings, and during the period allowed for redemption, having funds in his hands received from rents of the property remaining after the payment of the mortgage debt, should pay the taxes which were a lien upon the premises at the time of the decree and sale, whether provided for in the mortgage or not, but not as to taxes which had not been levied at the time of the sale.

4. TAXES—*Who Liable for Their Payment.*—Under Sec. 59, Chap. 120, R. S., entitled Revenue, the owner of property on the first day of May in any year, is liable for the taxes of that year, but this fact is no justification for a court having in its possession funds belonging to a person so liable to appropriate them to paying that obligation.

5. TAXES—*Period of Redemption—No Reimbursement for Purchaser.*—The act approved June 4, 1889, makes provision for cases where the purchaser of real estate at a sale, under a judgment or decree, pays taxes or assessments which become a lien during the period allowed for redemption, by permitting the amount of such taxes or assessments so paid, with interest, to be added to the sum due on the certificate of sale when redemption is made. Rev. Stat. Ill., Chap. 77, Sec. 27 a. But the statute nowhere provides that the purchaser shall be reimbursed for taxes which have become a lien and have been paid by him, for which the premises are liable in cases where the right of redemption is not exercised. The maxim *expressio unius est exclusio alterius*, is not without application.

6. FORECLOSURE PROCEEDINGS—*Relations Between the Owner and the Purchaser.*—In foreclosure proceedings, where the debt and decree are satisfied by a sale of the premises for the full amount of the debt, interest and costs, afterward, and as between the purchaser and the equity of redemption, the jurisdiction of the court ceases when the title to and possession of the property has been completely perfected in the purchaser.

Dale v. Davis.

7. FORECLOSURE PROCEEDINGS—*Purchaser Takes with Notice of Taxes, etc.*—The purchaser at a foreclosure sale takes with notice of the law that the owner is entitled to the rents and profits during the period of redemption, that the property is subject to annual taxes, and that one year's taxes will be levied on the property before he will be entitled to possession.

Memorandum.—Foreclosure proceedings; order as to payment of taxes. Error to the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1893, and reversed with directions. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

BRIEF OF PLAINTIFF IN ERROR, WILLIAM BRACE AND ALDRICH,
PAYNE & DEFREES, ATTORNEYS.

It is well settled that the rents and profits during the time intervening between the master's sale and deed, belong to the owner of the equity of redemption, and that he can not be required to account to the purchaser therefor. *Stevens v. Insurance Co.*, 43 Ill. 327; *Bennett v. Matson*, 41 Ill. 332.

By our laws the defendant is entitled to the possession from the day of sale to the making of the master's deed. *O'Brien v. Fry*, 82 Ill. 274.

The mortgagor has the right to remain in possession until the purchaser becomes entitled to his deed, and such mortgagor in possession is not liable for use and occupation, or to account for the rents and profits. *Rockwell v. Servant*, 63 Ill. 424.

FRANKLIN P. SIMONS, attorney for defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Pending foreclosure proceedings, and before decree, a receiver was appointed, of the mortgaged premises, to collect rents, etc.

At the sale under the foreclosure decree the full amount of the mortgage debt, interest, and costs, was realized—in other words, the decree was satisfied by the sale—the defendant

in error, who was the complainant below, becoming the purchaser.

Manifestly with the decree fully satisfied by the sale, the necessity for continuing the receivership was gone, and the owner of the mortgagor's equity of redemption became entitled to the possession of the mortgaged premises during the period allowed by law for redemption from the sale.

The sale occurred December 21, 1891. On January 26, 1892, a motion in the cause by plaintiff in error for the discharge of the receiver and for an order on him to pay to the plaintiff in error, who was the owner of the equity of redemption, the sum of money remaining in his hands as shown by his report, was heard by the court, and the same as to the payment to the plaintiff in error by the receiver of the balance so appearing to be in his hands, was granted, but as to the discharge of the receiver, it was ordered that the motion stand continued indefinitely.

It does not appear that the motion for the discharge of the receiver was renewed until after the time of redemption had expired, and the final report of the receiver came on to be considered. In the meantime, during said fifteen months, the receiver filed several reports, showing his receipts and disbursements and the balances remaining in his hands, and orders were entered on each of said reports directing the payment by the receiver of said respective balances, aggregating several thousand dollars, to the plaintiff in error. In one of said reports was an item of \$1,574.80, paid for taxes on the property for the year 1891, to which there was no objection.

The time for redeeming the premises expired on March 21, 1893, and not being redeemed the purchaser at the sale received a master's deed therefor.

The receiver's final report, filed March 31, 1893, summarized all his previous reports and the orders thereon, and payments to plaintiff in error of the respective balances, and showed a net balance remaining in his hands of \$2,074.21.

Thereupon, the defendant in error, who purchased the premises at the sale thereof, on December 21, 1891, and who had received the master's deed therefor, petitioned the court

for an order on the receiver to pay the taxes of 1892 on said premises, amounting to \$1,657.64.

The petition was answered by the plaintiff in error, admitting the amount of the taxes for 1892 to be \$1,657.64, but denying that they ought to be paid out of the funds held by the receiver, and claiming that they should be borne and paid by the purchaser, and claiming for himself the said funds.

Upon a hearing upon the petition and answer, the court apportioned the taxes and ordered the receiver to pay to the defendant in error \$1,473.50, as being that portion of the taxes for 1892, estimated and apportioned as ten and two-thirds months from May 1, 1892, to March 22, 1893.

From such order this writ is prosecuted.

With the satisfaction of the decree by the sale of the premises, the plaintiff in error, who was the owner of the equity of redemption in the premises sold at the time of the sale and continued to be such until the time for redemption expired, became entitled to the possession of the premises and the rents and profits arising therefrom during the period the right of redemption lasted. *Stevens v. Insurance Co.*, 43 Ill. 327; *Bennett v. Matson*, 41 Ill. 344.

The fact that the receiver was permitted to hold possession did not alter the rights of the owner of the equity of redemption.

The possession of the receiver must be considered as for the benefit of him whose right to the possession existed, and should not be allowed to destroy or impair the benefits the law accords to him during the redemption period.

It was right enough that the receiver should pay, as was done, the taxes of 1891, which were a lien on the premises at the time of the decree and sale. Whether so provided in the mortgage or not, the mortgagee might have paid the same and by appropriate pleadings, amendatory or supplemental, have had the amount thereof included in the decree for which the premises were to be sold; and what might have been done in that way was properly permitted to be done by the receiver for the protection of the mortgagee, whose interests he had been appointed to conserve.

But as to the taxes of 1892, which had not been levied at the time of the sale, and for which no lien against either the person or the property of the mortgagor existed until a day more than four months after the sale, no such reason applies.

Doubtless, under the statute, the owner of property on the first day of May in any year, shall be liable for the taxes of that year. Rev. Stat. Ill., Chap. 120, entitled Revenue, Sec. 59.

But because thereof, it is no justification for a court having in its possession funds belonging to a person so liable, to appropriate them to paying that obligation.

The jurisdiction was invoked and existed in that suit only for the purpose of subjecting the mortgaged premises to the payment of the mortgage indebtedness, and such further relief as was incidental to the exercise of complete justice between the parties under the jurisdiction acquired for the main purpose.

The debt and decree were fully satisfied when the premises were sold for the full amount of the debt with interest and costs. After that and as between the purchaser and the owner of the equity of redemption, the jurisdiction of the court ceased when the title to and possession of the property he purchased had been completely perfected in the purchaser.

Whatever other obligations there may be between such purchaser and the owner, having no connection with the subject-matter of the foreclosure suit, may perhaps be determined elsewhere, but can not be so done in that suit.

The act approved June 4, 1889, makes provision for cases where the purchaser of real estate at a sale under a judgment or decree, shall pay taxes or assessments which become a lien during the period allowed for redemption, by permitting the amount of such taxes or assessments so paid, with interest, to be added to the sum due on the certificate of sale when redemption is made. Rev. Stat. Ill., Chap. 77, Sec. 27 a. But the statutes nowhere provide that the purchaser shall be reimbursed for taxes which have become a lien and been paid by him, or for which the premises are liable in

Dale v. Davis.

cases where the right of redemption is not exercised. The maxim *expressio unius est exclusio alterius*, is not without application.

The purchaser bought with notice of the law that the owner was entitled to the rents and profits of the property during the time for redemption; that the property was subject to annual taxes, and that one year's taxes would be levied on the property before he would be entitled to possession.

The fact that the purchaser was also the mortgagee does not advantage him so far as the question here involved is concerned. The money in the hands of the receiver was received from rents of the property and belonged to the owner. The court had no authority to take it away from him, his debt having been fully satisfied. There was no occasion for the exercise of general justice between the parties, for no legal obligation existed upon which to rest its application.

The order of the Circuit Court will therefore be reversed with directions to that court to order the receiver to pay to the plaintiff in error the sum of \$1,473.50, which was by the order in question directed to be paid to the defendant in error.

MR. JUSTICE GARY.

I agree with all that Mr. Justice Shepard has written except that I think that the mere accident that a fund was in the hands of the receiver and therefore under the control of the court, which accrued from the subject-matter of the suit, gave to the court authority to dispose of that fund as the right and justice of the matter might be between the parties. That is, that the court, having the parties before it, and the fund within its control, might do complete justice as to all matters incidental to the principal matter upon the same principle that warrants a writ of assistance after the time of redemption has expired, and the purchaser has his deed. *Heffron v. Gage*, 44 Ill. App. 147; *Carpenter v. White*, 43 Ill. App. 448.

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151	232
51	334
59	23
51	334
66	208

Lake Shore & M. S. Ry. Co. v. Marie Ouska, Admr., etc.

1. **NEGLIGENCE—Due Care.**—Negligence and due care are questions of fact for a jury to decide.

2. **DAMAGES—Death from Negligent Act.**—The damages in case of a negligent act can not be more than the pecuniary injury to the widow and the next of kin. It is impossible to compute them with mathematical exactness.

3. **RAILROAD COMPANY—Right to Obstruct Public Street.**—A railroad company can claim no right to shut the citizen from the public street; and if it makes the danger in so doing imminent, nothing can prevent a jury from finding against it, when injury follows.

Memorandum.—Action for damages. Death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

STATEMENT OF THE CASE.

On July 2, 1890, Josef Ouska was crossing the tracks of appellant on State street near 63d street, and while in the act of doing so, he was killed by a suburban train, called a dummy train, coming from the east on its way to appellant's depot at Van Buren street in Chicago.

This action is case, brought by his administratrix to recover for the death.

APPELLANT'S BRIEF, GARDNER & McFADON AND PLINY B. SMITH, ATTORNEYS.

The rule of law is clear that one who runs, with a view of crossing a track of a railroad company, ahead of a locomotive moving in rapid motion thereon, and who, miscalculating the distance, is injured in the attempt, is guilty of such contributory negligence that he can not recover for his injury. *Chicago & A. R. Co. v. Frear*, 53 Ill. 115; *Bellefontaine v. Hunter*, 33 Ind. 335; *Chicago R. Co. v. Bell*, Adm'r, 70 Ill. 108; *R. R. Co. v. Houston*, 95 U. S. 697; *Thomas, Adm'r, v. D. L. & W. R. R. Co.*, 8 F. R. 732.

L. S. & M. S. Ry. Co. v. Ouska.

APPELLEE'S BRIEF, JESSE COX AND GIDEON F. LANAGHEN,
ATTORNEYS.

It is the duty of all railroad companies, whose roads run through a village, to run their trains while in the village at such a rate of speed as to have them under control, and be able to avoid injury to persons or property, though there is no ordinance of such village on the subject. And if they fail to do so, they are guilty of negligence. *Chicago & A. R. R. Co. v. Engle*, 84 Ill. 397; *L. S. & M. S. Ry. Co. v. Bodemer*, 139 Ill. 596.

Railroad companies are not at liberty to adopt the same rate of speed in the densely settled city as in the country, even where there is no express statute or ordinance on the subject. *Chicago & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132.

Railroad companies, in operating their cars in crossing public highways, must so regulate the speed of their trains and give such signals to persons passing, that all may be apprised of the danger of crossing the railroad track; and a failure in any of these duties, on their part, will render them liable for injuries inflicted and for wrongs resulting from such omissions. *R. R. I. & St. L. R. R. Co. v. Hillmer*, 72 Ill. 235; *L. S. & M. S. Ry. Co. v. Johnson*, 135 Ill. 649.

When a road is so constructed that its crossings are especially dangerous, the company must be held to a sufficient degree of diligence to, so far as possible, overcome the danger.

A railroad company is chargeable with notice of all the perilous circumstances of a crossing constructed by itself. *R. R. I. & St. L. R. R. Co. v. Hillmer*, 72 Ill. 239; *Chicago, B. & Q. R. R. Co. v. Payne*, 59 Ill. 541.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Just west of State street in the city of Chicago, twenty-one railroad tracks cross 63d street from the northwest to the southeast, and after crossing 63d street curve more toward the east and cross State street very near 63d street.

Shortly before seven o'clock of a bright clear morning on

the second day of July, 1890, Joseph Ouska, the husband of the appellee, arrived on State street at 63d street on his way, with several others, to his work at a mill south of 63d. From the evidence it appears that he was stopped several minutes by a train that filled the street. When that moved and Ouska and his companions went on south, they could see another train standing, if not partly in State street, very close to it on the east side, from which one hundred people, more or less, were landing.

In the meantime the whistle of the mill calling to work, had blown, and Ouska and his companions were hurrying toward it. In this condition of things, of which any description can convey but a very imperfect idea of what must have been the noise and confusion by which Ouska was surrounded, a train of the appellant, from the southeast, came on a track southwest of either of the other trains, at a speed of more than twenty miles per hour across State street and killed Ouska. He left a widow and five children, two of the latter grown and able probably to take care of themselves; the others of tender years. He was forty-five years old, and supported his family by his wages, which were nine or ten dollars a week when he had work. The verdict is \$5,000.

Negligence and due care are questions of fact for a jury to decide. It does not change the rule that no prophet is needed to foretell the decision. It may well be urged that no man exercising ordinary care would attempt to cross that network of rails; but the appellant can claim no right to shut the citizen from the public street; and if the appellant makes the danger so imminent, nothing can prevent a jury from finding against it, when injury follows. We do not care to comment on the circumstances of the view blocked by other trains, the noises, the throng of people, the train speeding through.

The principle of *Pennsylvania Co. v. Keane*, 41 Ill. App. 317, is applicable. The fact that the deceased was not intending to be a passenger, as in that case, does not affect the question of carelessness of the appellant.

The damages may not be more than the pecuniary injury to the widow and next of kin. It is impossible to compute

Vallens v. Hopkins.

them with mathematical exactness. The objection, based on *C. M. & St. P. Ry. v. Halsey*, 133 Ill. 248, that an instruction limits the exercise of care by the deceased to "the time of the injury," is removed by the later case of this appellant *v. Johnson*, 135 Ill. 641, which construes the words "at the time" as covering the whole "series of circumstances." That here the words must have been so understood, is shown by the fact that the fourth and fifth instructions asked by, and given for, the appellant, use the same words in that sense. There is no error and the judgment is affirmed.

51	337
157*	287

Vallens v. Hopkins.

1. **SHORT CAUSE CALENDAR—Practice.**—The rule of court containing a clause that "No cause shall be noticed for trial on such calendar until the same is at issue," does not apply to appeals from justices. On such appeals there are no written pleadings.

2. **APPEALS FROM JUSTICES—When Properly for Trial.**—An appeal from a justice of the peace may be properly placed upon the trial docket of the court to which it is taken, where the appeal is perfected eleven days before the first day of the term.

3. **NOTICE—To Attorneys, When to Clients, etc.**—In an appeal case from a justice of the peace, a notice served by appellant upon the attorneys who appeared for the appellee before the justice was held good.

Memorandum.—Forcible detainer. In the Superior Court of Cook County, on appeal from a justice; the Hon. THEODORE BRENTANO, Judge, presiding. Appeal by the defendant. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 13, 1894.

The statement of the facts is contained in the opinion of the court.

ADOLPH ASCHEE, attorney for appellant.

COY & BROCKWAY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant before a justice of the peace in an action of forcible detainer, and was defeated.

He appealed to the Superior Court, by filing a bond with the justice May 25, 1893, and the transcript, etc., were filed in the Superior Court the 27th of the same month. The June term of the Superior Court commenced on the 5th day of that month. On the 1st day of June, the appellee served notice under the "Short Cause" act on Messrs. Moran, Kraus & Mayer, who had defended the appellant before the justice, by giving it to a member of the bar in the employ of that firm. June 12th, the appellant appeared by another attorney and moved to strike said cause from said short cause calendar, for the following reasons:

"First. Because said cause was not at issue on the date when the notice to place the same on the short cause calendar, to wit, June 1, 1893, is alleged to have been given, as provided by rule 18 of the common law rules of said court; that said cause was not at issue until Monday, the 5th day of June, A. D. 1893."

"Second. Because no notice was given to the defendant, his agent or attorney, of the placing of said cause on the short cause calendar, as required by the statute in such case made and provided."

This motion was denied the same day. The cause was not reached until June 26th, when the motion was renewed—denied—and the cause tried *ex parte*, the appellant withdrawing from the court.

Reason "first" is based upon a rule of the court containing a clause that "No cause shall be noticed for trial on such calendar until the same is at issue."

This does not apply to appeals from justices. On such appeals there are no written pleadings.

The argument, however, is that, as the appeal was not in the Superior Court ten days before the June term, nothing could be done in it at that term.

The appeal was taken eleven days before the term, and the case is therefore governed by the decision in *Boyd v. Kocher*, 31 Ill. 295.

We have been over the question in *Bessey v. Ruhland*, 33 Ill. App. 73, and abide by the views there expressed.

Reason "second" is based upon the lack of evidence that

Firemen's Ins. Co. v. Thompson.

Moran, Kraus & Mayer were the attorneys of the appellant when the notice was served. That they were, before the justice, is conceded. That the notice, as served, was in fact notice to the appellant, is apparent, for it brought him into court by another attorney. Neither the appellant, nor any member of the firm, made affidavit denying the relation of attorney and client at the time the notice was served. Fourteen days elapsed after the first appearance by the other attorney, before the trial.

On the whole case it was pretty clear that delay only was the object of the appellant, and it was not an unfair inference that the appearance by the present attorney was really a substitution of one attorney to the place the firm held before.

There is only a question of technicality—none of merits—and such questions meet little favor here. *Brown v. Johnson*, No. 4916, this term.

Firemen's Insurance Co. v. Thompson.

51	339
155	204

1. *STATUTES—Construction of—Service of Process.*—Under a statute of Wisconsin, providing that “Whoever solicits insurance on behalf of any insurance corporation, or transmits an application for insurance, or a policy of insurance to or from any such corporation, or who makes any contract of insurance, or collects or receives any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business for any insurance corporation, or advertising to do any such thing, shall be held an agent of such corporation to all intents and purposes, and the word ‘agent’ whenever used in this chapter, shall be construed to include all such persons,” *it was held*, that foreign insurance companies doing business in that State must submit to the conditions of the law, and that service of summons upon an agent of such a company gave the court issuing it jurisdiction of the company.

Memorandum.—Action of debt. In the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Declaration on a judgment of a sister State; pleas, *nul tiel record* and special plea denying service of process in the State of Wisconsin; trial by the court;

judgment for plaintiff; defendant appeals. Heard in this court at the October term, 1898, and affirmed. Opinion filed February 8, 1894.

The opinion states the case.

APPELLANT'S BRIEF, WM. J. AMMEN, ATTORNEY.

A judgment of a court of another State, though having the faith and credit of a domestic judgment, may be impeached in the usual way for want jurisdiction of either the person of the defendant, or the subject-matter of the suit. *Kings Co. Fire Ins. Co. v. Swigert*, 11 Ill. App. 590; *Welch v. Sykes*, 3 Gilm. 197; *Lawrence v. Jarvis*, 32 Ill. 304; *Jones v. Warner*, 81 Ill. 343.

APPELLEE'S BRIEF, JACKSON & EATON AND H. I. WEED,
ATTORNEYS.

Upon the question of jurisdiction obtained by service under such statutes as those of Wisconsin generally, appellee cites the following authorities: *Ehrmann v. Teutonic Ins. Co.*, 1 Fed. Rep. 471; *Knapp v. National Mut. Ins. Co.*, 30 Fed. Rep. 601; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Chaperlori v. Continental Ins. Co.*, 132 U. S. 204.

In 67 Wis. 624, the court says: "Manifestly it was not the intention of the legislature that the right of serving process upon foreign insurance companies doing business within this State should be dependent upon their first taking out a license."

"The courts of other States have taken similar views of similar statutes." *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; *Ganzer v. Firemen's Ins. Co.*, 3 Minn. 372; *Swan v. Insurance Co.*, 96 Pa. St. 37; *Insurance Co. v. Huron Salt Co.*, 36 Mich. 346; *Insurance Co. v. Kern*, 8 Kans. 9; *Pope v. T. H. C. & M. Co.*, 87 N. Y. 137; *Osborne v. Shawmut Ins. Co.*, 51 Vt. 278; *Nichols v. U. S. Mercantile R. R. Co.*, 74 Mo. 457; *Swift v. State*, 25 Am. Law Register (N. S.) 594; *Lho-neaux v. Hong Kong & S. S. Corp.*, L. R., 33 Ch. Div. 446.

Foreign insurance companies are not compelled to do busi-

Firemen's Ins. Co. v. Thompson.

ness in Wisconsin. If they voluntarily choose to do so, however, they must submit to such conditions and restrictions as the legislature may see fit to impose. *Fire Dep't v. Halfenstein*, 16 Wis. 136; *State ex rel., etc., v. Doyle*, 40 Wis. 176.

A judgment rendered by a court of competent authority having jurisdiction of the parties and subject-matter in one State is conclusive on the merits in the courts of every other State. *Black on Judgments*, Sec. 857; *Welch v. Sykes*, 3 Gilm. 197; *Bimeler v. Dawson*, 4 Scam. 536; *McJilton v. Love*, 13 Ill. 486; *Smith v. Smith*, 17 Ill. 482; *Bilton v. Fisher*, 34 Ill. 32; *Zepp v. Hagar*, 70 Ill. 323.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case, small in amount involved, presents a question of great importance.

The appellant, a Chicago corporation, issued a policy against fire on the shingle mill of the appellee in Oshkosh, Wisconsin. A loss having occurred, he sued the appellant in the Circuit Court of Winnebago County, Wisconsin, in which county Oshkosh is, and recovered a judgment, upon which judgment this action was brought. The question is as to the jurisdiction of that Circuit Court over this body corporate, the appellant.

Without reciting in detail the evidence, we assume as proved, that there was a firm of L. S. Tuttle & Co., insurance agents, doing business in Oshkosh; that from the appellee they received an application for the insurance for which the policy issued; that they sent the application to insurance agents in Chicago, who, with it, applied to the appellant and received the policy, which they sent to the Oshkosh agents, who delivered it to the appellee; that the appellee paid the premium to the Oshkosh agents and they paid it to the Chicago agents, who paid it to the appellant; that the appellant knew only the Chicago agents in the transaction, and they knew only the Oshkosh agents.

The Wisconsin judgment was obtained on service in the mode provided by the statute of that State on one of the

firm of Oshkosh agents, but it does not appear that he personally received the application or premium from, or delivered the policy to, the appellee. We shall pass over the question whether that feature of the case is important, as well as whether the service should have been on both members of the firm, as being merely technical, and consider only the one question of paramount importance.

A statute of Wisconsin in force when the policy issued is: "Whoever solicits insurance on behalf of any insurance corporation, or transmits an application for insurance, or a policy of insurance to or from any such corporation, or who makes any contract of insurance or collects or receives any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business for any insurance corporation, or advertising to do any such thing, shall be held an agent for such corporation to all intents and purposes, and the word 'agent' whenever used in this chapter, shall be construed to include all such persons."

The Wisconsin courts enforce this statute according to its letter, holding that service may "be made upon any one who does any of the acts designated for an insurance company." *State v. Northwestern Endow., etc.*, 62 Wis. 174; and that "foreign insurance companies are not compelled to do business in this State. If they voluntarily choose to do so, however, they must submit to such conditions and restrictions as the legislature may see fit to impose." *State v. U. S. Mut. Acc.*, 67 Wis. 624.

Now, the appellant had notice by the application, that the risk was on fixed property in Wisconsin. If it chose to accept the risk, it did so upon the terms which that State had prescribed. It knew that in the ordinary course of business, the application had, or might have, been made to somebody doing an insurance business at Oshkosh, and that somebody would, or might, deliver the policy to the appellee.

Before the policy issued, was the time for the appellant to consider the liability it would incur under Wisconsin law, and the probability that it might provide a more ready

A. B. Dick Co. v. Sherwood Letter File Co.

remedy for a loss under the policy, than to follow the insurance company to another State, and there present in detail the evidence of such loss. The policy of probably every State is to make such regulations as will insure a speedy and effective remedy to the assured when losses occur, and companies engaged in the business all know it. The judgment will therefore be affirmed.

We add that the case presents a question worthy of the consideration of the Supreme Court.

51	343
157	325
51	343
63	254

A. B. Dick Company v. Sherwood Letter File Company.

1. **CONTRACTS**—*Construction of the Phrase "Line of Goods."*—In a contract providing that for and in consideration, etc., the second party agrees to pay to the party of the first part, at the expiration of one year from the date hereof, a sum equal to ten per cent of the net aggregate sales of the line of goods above mentioned, hereafter sold by the party of the second part, their licensees, agent or agents, provided that such payment shall not in any event exceed the sum of one thousand dollars, *it was held*, the term "line of goods" as used in the contract, did not mean the specific articles in which the contracting party dealt in the same forms, but articles to serve the same purpose and adapted to the same uses.

Memorandum.—In chancery. Bill for an accounting. Appeal from the Superior Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 1, 1894.

The opinion states the case.

APPELLANT'S BRIEF, JOHNSON & MORRILL AND D. J. SCHUYLER, ATTORNEYS.

If the defendant did not acquire under this contract the sole and exclusive right to manufacture the unpatented articles which were held by the court to have been conveyed to him by the terms thereof, then the consideration failed, and the complainant has no standing in equity, for the rea-

son that it could not convey to the defendant what it agreed to, and the contract is therefore an onerous and burdensome one, and one which a court of equity will not lend itself to enforce. *Montgomery P. S. Y. Co. v. Street Stable Car Line (Ill.)*, 31 N. E. Rep. 437; *Story's Equity Jurisdiction*, Secs. 776 and 787; *Bispham's Equity*, Secs. 372, 374; *Hamilton v. Harvey*, 121 Ill. 469; *Kimball v. Tooke*, 70 Ill. 553; *Stone v. Pratt*, 25 Ill. 25; *Fish v. Leser*, 69 Ill. 394; *Lear v. Chouteau*, 23 Ill. 39; *Harrison v. Lodge*, 116 Ill. 279.

Nor will a court of equity enforce a contract or compel an accounting under a contract where there are no corresponding obligations, and the contract is so indefinite in its terms that it can not be specifically enforced. *Marr v. Shaw*, 541 Fed. Rep. 864; *Wollensack v. Briggs*, 20 Ill. App. 50; 119 Ill. 459; *Shenandoah Valley v. Lewis*, 76 Va. 833; *Schneeling v. Kriesel*, 45 Wis. 325; *Nichols v. Williams*, 22 N. J. Eq. 63; *Colsen v. Thompson*, 2 Wheat. 236; *Los Angeles v. Phillips*, 56 Cal. 539; *Bowman v. Cunningham*, 78 Ill. 48; *Blanchard v. D., L. & M. Company*, 31 Mich. 43; *Watts v. Evans*, 113 Ill. 186; *Olmstead v. Abbott*, 18 Atl. Rep. 315; *Angel v. Simpson*, 85 Ala. 53; *Stout v. Weaver*, 52 Wis. 748; *Burnett v. Kullak*, 76 Cal. 535.

T. H. SIMMONS, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

On the 9th day of August, 1888, the appellant was in business in Chicago, and so far as this record shows, only selling the Edison Mimeograph, a device for multiplying copies of manuscript. We infer that the principal market for that ingenious device was in business offices. The appellee was also in business in Chicago manufacturing and selling various articles of office and bank furniture. The parties made this agreement.

"This agreement made this 9th day of August, 1888, by and between the Sherwood Letter File Company, party of the first part, and the A. B. Dick Company, party of the second part, both parties being corporations organized and existing under the laws of the State of Illinois,

Witnesseth: Whereas, the said party of the first part is the owner of letters patent No. 368,498, dated August 16, 1887, No. 381,959, dated May 1, 1888, No. 382,623, dated May 8, 1888, and is also the owner of the application for letters patent No. 257,097, filed December 6, 1887, and is now engaged at Chicago, Illinois, in the manufacture and sale of the articles covered by the above mentioned letters patent and applications and other articles of office and bank furniture, and

Whereas, the said A. B. Dick Company desires to acquire the exclusive right to manufacture and sell all the articles now manufactured and sold by the party of the first part in and throughout the United States and territories.

Now, therefore, in consideration of the remuneration and reward hereinafter mentioned, the said party of the first part hereby agree to transfer and convey, and does by these presents hereby transfer and convey, to the said second party and its successors and assigns, the good will, and all the business hereinbefore mentioned, together with the sole and exclusive right and license to manufacture, and to grant to others the right to manufacture, all the articles covered by the above said letters patent and said application, and to sell and grant to others the right to sell said articles now owned or controlled by the said first party, together with any and all patents which may be obtained for improvement on same, or for office devices of a like character which may be intended to supersede the articles now being manufactured.

It is also further agreed that should any of the present members of the party of the first part contrive, invent or produce any new article or articles of manufacture during the life of this contract, it or they shall be submitted to the party of the second part for purchase or manufacture on a royalty basis, and the said party of the second part shall have the option of accepting such inventions or product at the same price which may be offered for the same by any other disinterested party.

It is also stipulated and agreed that the title to said let-

ters patent and application above mentioned, will be maintained and protected by the party of the first part.

That for and in consideration of the foregoing, the said second party agrees to pay to the said party of the first part at the expiration of one year from the date hereof, a sum equal to ten per cent of the net aggregate sales of the line of goods above mentioned, hereafter sold by the party of the second part, their licensees, agent or agents, provided that such payment shall not in any event exceed the sum of one thousand dollars; at the expiration of two years from the date hereof a sum equal to ten per cent of the net aggregate sales for the year immediately preceding, provided that such payment shall not, in any event, exceed the sum of one thousand dollars; at the expiration of three years from the date hereof, a sum equal to ten per cent of the net aggregate sales for the year immediately preceding, provided that such payment shall not, in any event, exceed the sum of two thousand dollars; at the expiration of four years from the date hereof, a sum equal to ten per cent of the net aggregate sales for the year immediately preceding, provided that such payment shall not, in any event, exceed the sum of three thousand dollars; at the expiration of five years from the date thereof, a sum equal to ten per cent of the net aggregate sales for the year immediately preceding, provided that such payment shall not, in any event, exceed the sum of four thousand dollars; and for all the time and up to the time of expiration of all the patents above mentioned, a sum equal to ten per cent of the net aggregate sales for the year immediately preceding, provided that such payment shall not, in any event, exceed the sum of four thousand dollars per year; provided, always, that at any time after the expiration of two years from the date hereof, the said second party shall have the option and right to purchase of the said first party all the right, title and interest of the said first party in and to the business above mentioned, and all its letters patent and applications for patents mentioned herein, or patents or applications for patents on any improvements and patents and applications for patents on any and all of the articles manu-

A. B. Dick Co. v. Sherwood Letter File Co.

factured, sold or controlled by it, at the time of such sale, which the said second party shall pay therefor and in full the sum of twenty thousand dollars as follows: Not less than fifty per cent of the amount in cash, with the option of paying the remainder in cash or at the expiration of one year from the date of such purchase.

Upon the payment of said sum or sums the said first party shall execute the necessary conveyances and assignments to transfer and convey the same to the party of the second part, its successors and assigns, and no further or other payments shall then be made, or thereafter be made to the said first party, and this contract shall terminate and end.

Witness our hands and seals on the day and date aforesaid.

SHERWOOD LETTER FILE Co.,

Attest:

Per C. W. SHERWOOD, Pres.

A. B. SHERWOOD, Sec'y-Treas.

A. B. DICK COMPANY,

Attest:

Per A. B. DICK, Pres.

GEO. J. BINGHAM, Sec'y."

The question now is whether the words "a sum equal to ten per cent of the net aggregate sales of the line of goods above mentioned" mean that per cent of all sales of office and bank furniture (exclusive of mimeographs) or something less.

The Circuit Court held that they did not mean all such sales of a device called the "Rival Solid Arch File" which the appellant had devised, constructed and sold for the same uses as a device called the "Sherwood Board Paper File," which the appellee had manufactured and sold before the contract, and which the appellant manufactured and sold for some two years after the contract; nor sales made by the appellant out of the United States and its territories. Of this ruling the appellee complains.

The appellant complains of the ruling by the court that the words quoted meant sales of other articles than such as were patented under the letters patent mentioned in the contract.

The situation of the parties at the time the contract was made was that the appellee was in the business of supplying "office and bank furniture," but only such as was for the convenient care of papers. The highest price of any article in which the appellee dealt was \$180.

At the time of the contract, the appellee sold its stock on hand and tools to the appellant for \$3,339.12.

The appellant was not in the same line of business—not a competitor in anything. It had a business, however, to which the business of the appellee could well be joined. The appellant bought everything that the appellee had with which to conduct business, as well as the good will of the business.

Had no patents or future inventions been alluded to in the contract, and the time of its expiration fixed at a date named, there would be nothing upon which to hang an argument that "the line of goods" did not mean all that class of "office and bank furniture" in which the appellee dealt. The introduction into the contract of provisions regarding patents and future inventions does not narrow the meaning of "line of goods." We are convinced that the court was right as far as it went, but that the appellee is entitled to more.

"Line of goods," as used in the contract, does not mean the specific articles in which appellee dealt, in the same forms, but articles to serve the same purposes, adapted to the same uses. And when sold by the appellant anywhere, it must pay the percentage. The example of the Supreme Court in *Scroggs v. Cunningham*, 81 Ill. 110, and its reasoning as well as its example in *Heissler v. Stose*, 131 Ill. 393, are authority for awarding interest to the appellee.

The decree of the Circuit Court for \$6,354.72 in favor of the appellee is affirmed, but that part denying more is reversed and the cause remanded with directions to cause an account to be taken of the sales of the "Rival Solid Arch File" and include in another decree to be rendered the percentage on such sales, and also on sales made in countries other than the United States and territories, with interest on both

Geuder & Paescheke Mfg. Co. v. Am. Trust & Sav. Bk.

at the rate of five per cent per annum from the 22d day of April, 1893, the date of the master's report on which the present decree is based.

This direction does not give the appellee all the interest to which it is entitled. It might claim interest from the time the money was due under the contract. Heissler v. Stöse, 131 Ill. 393; but there is no cross-error assigned that brings that question before us.

In respects not mentioned in these directions, the decree is affirmed and the appellee will recover its costs. Reversed and remanded.

Geuder & Paescheke Mfg. Co. v. American Trust & Savings Bank.

51	349
150*	336

1. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—*Title to Unpaid Checks.*—S. & Co. received from G. P. & Co. a check on a Kansas bank, payable to the order of G. P. & Co. and indorsed by G. P. & Co., "For deposit with S. & Co., to the credit of G. P. & Co." On the next day S. & Co. made an assignment. The payment of the check was stopped and the check itself returned to the assignee. *Held*, that G. P. & Co. were entitled to have the check returned to them.

Memorandum.—Assignment for the benefit of creditors. Appeal from an order of the County Court of Cook County, refusing to instruct the assignee to surrender certain property; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, WEIGLEY, BULKLEY & GRAY, ATTORNEYS.

Checks deposited and credited as cash do not become the property of the bank so that it takes the risk upon itself, even though the depositor has been allowed to check against the deposit before the paper is collected, and the depositor can recall the check or other paper, if it is still in the pos-

VOL. 51.] Geuder & Paescheke Mfg. Co. v. Am. Trust & Sav. Bk.

session of the bank. 2 Morse on Banks and Banking, (3d Ed.) Sec. 586; Balbach v. Frelinghuysen, 15 Fed. Rep. 675.

MORAN, KRAUS & MAYER, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is assignee in insolvency of Abraham G. Becker, surviving partner of the firm of Herman Schaffner & Co., private bankers in Chicago. The appellant kept an ordinary banking account with Schaffner & Co.

On the second day of June, 1893, Schaffner & Co. received in a letter, from the appellant, at Milwaukee, a check, payable to the order of the appellant upon a bank in Kansas, and indorsed by the appellant "For deposit with Herman Schaffner & Co. to the credit of Geuder & Paescheke Mfg. Co."

The next day, the firm of Herman Schaffner & Co. being insolvent, Becker made the assignment to the appellee.

The payment of the check was stopped, the check returned to the appellee, and this is a petition by the appellant that the County Court should direct that it be surrendered to the appellant.

The County Court refused. Had the money on the check been paid and mingled with the funds of Schaffner & Co., in any of the ways by which commercial business is conducted, so that the identity was gone, the appellant would have no case. Mutual Acc. Ass'n v. Jacobs, 141 Ill. 261.

But the check not being paid, and remaining in the hands of the appellee, if it had been received by Schaffner & Co. with an actual intent to defraud the appellant of its value, the appellee would have no defense.

He is not a *bona fide* purchaser—merely a volunteer, standing in the shoes of Schaffner & Co., and subject to all claims for rescission that would have been good against them.

Now, the statute, Ch. 38, Sec. 25a (Hurd), 118 (Starr & Curtis) makes this assignment *prima facie* evidence of the intent of Schaffner & Co., to defraud; whether by reason of insolvency or not, is foreign to the present inquiry.

Dick v. Marble.

The statute is in place of proof that Schaffner & Co. received the check with intent to defraud the appellant, by what method, is immaterial.

The order of the County Court is reversed and the cause remanded to the County Court, with directions to that court to order the appellee to surrender the check to the appellant.

Dick v. Marble.

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155a 137

1. **WRITTEN INSTRUMENTS—***Construing an Ambiguous Writing.*—Where a writing is ambiguous, extrinsic circumstances may be of value in elucidating the true meaning. The court and jury in interpreting what a writer meant, should put themselves as far as possible in the position he was when he wrote.

2. **CONTRACTS—***When not to be Varied by Parol.*—The clear meaning of an instrument as to which no latent ambiguity appears, can not be varied by parol.

3. **LETTERS—***Admissions.*—A letter concerning a transaction can not be treated as a contract; it is in the nature of an admission; the circumstances under which it was made may be shown; the weight to be given to the statements therein contained may be thus affected. The jury are not to decide what the writer meant, but under the circumstances of the writing, what weight, as an admission, is to be given to the letter.

4. **INSTRUCTIONS—***Province of the Jury.*—It is error to instruct the jury that they are to decide what the plaintiff intended by a statement in a letter written by him, whether it was a statement as to what his claim against the defendant was, or what he was willing to accept in view of the statements in said letter.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed January 29, 1894.

The opinion states the case.

JOHNSON & MORRILL, attorneys for appellant.

DEFREES, BRACE & RITTER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought by the appellee to recover an amount alleged to be due him in consideration of the transfer of certain stock in certain corporations. There was a verdict and judgment for appellee for the sum of \$5,000.

As the case must be tried again, we refrain from commenting on the evidence.

The seventh instruction given for the plaintiff, telling the jury that as to a letter written by appellee—"The jury are to decide just what the plaintiff intended by the statement in said letter, whether a statement as to what his claim against the defendant was, or a statement as to what he was willing to accept in view of the statement in said letter and all the other evidence in the case, and what seemed natural and probable under the facts as they appear in evidence. The jury are the sole judges as to what is the truth of the matter, as shown by the evidence,"—ought not to have been given.

Where a writing is ambiguous, extrinsic circumstances may be of value in elucidating the true meaning. The court and jury in interpreting what a writer meant, should put themselves as far as possible in the position he was when he wrote. *Emery v. Webster*, 42 Me. 204; *Knight v. Worsted*, 2 Cush. 271; *Martin v. Berens*, 5 Penn. St. 305; *Taylor on Ev.*, Sec. 1082; *Shore v. Wilson*, 2 Cl. & F. 556; *Gray v. Sharpe*, 1 Myl. & K. 602; *Simpson v. Magitson*, 11 Q. B. 32; 12 Jur. 155, 7 L. J. Q. B. 81.

The clear meaning of an instrument as to which no latent ambiguity appears, can not be varied by parol. The letter of appellee is not a contract, it is in the nature of an admission; the circumstances under which it was made might be shown; the weight to be given to the statements therein contained might be thus affected; the jury are not to decide what the writer meant, but under the circumstances of the writing, what weight, as an admission, is to be given to the letter.

In view of the letter written by appellee, dated February 24, 1891, stating that the amount owing him by appellant is

Doane v. Chicago City Ry. Co.

\$2,800, and the instruction thereon given, the judgment of the Circuit Court will be reversed and the cause remanded, unless appellee shall remit within five days, from his judgment, the sum of \$2,200; it will, in such case, be affirmed for \$2,800.

The costs of this appeal will be taxed against appellee.
Reversed and remanded.

Doane v. Chicago City Railway Co.

51	353
100s	22
51	353
70	255

1. **STREETS OF A CITY—For Public Use.**—The streets of a city are for the use of the public in whom is vested the right of control over them.

2. **STREETS—Public Interests in.**—Those who represent the public, as the legislature of the State or the authorities of cities, must, in whatever they do in respect to public ways and grounds, be guided solely by a regard for the public interests; but they may and frequently do grant to individuals special rights and privileges in respect to such ways and grounds, doing so because it is believed thereby the public interests will be conserved.

3. **CITY OF CHICAGO—Control Over Its Streets.**—The city council of Chicago has only such control over its streets as has been given to it by the State.

4. **STREETS—Effect of Legislation.**—In refusing to give the municipality authority to permit horse railways to be constructed in its streets the State did not impose upon the owners of abutting property any trust, or charge them with discharge of any public duty.

5. **STREETS—Trust Vested in the City with Respect to Their Use.**—The State has vested in the city a trust in respect to the use of its streets, but it can not vest in one or more private property holders the power to exercise in the interest and for the benefit of the public a discretion as to what use should be made of the public streets.

6. **STREETS—Right of Owners of Property Fronting on Same.**—There is in the framework of our State no warrant for bestowing upon property owners, as such, any of the functions of government.

7. **STREETS—Adjacent Owners—Character in Which They Act.**—If the owners of property abutting upon a street give or withhold their consent to the construction of a street railway before their doors they do so not in any public capacity, as servants or agents of the public, but as individuals, having regard solely to their individual interests, neither acting collectively nor in concert, or after discussion and consideration, but independently, and with reference, each for himself, to what he deems for his personal interest.

8. *STREETS—Expediency of Giving Power to Property Owners.*—The expediency of giving to property owners, as such, the power to prevent the devotion of public streets to such uses as the public good may require, is not a matter for the consideration of a court.

9. *STREETS—Adjacent Property Owner—Consent—Compensation.*—No property owner can be compelled to give his consent to the use of a street upon which his property abuts for a horse railway. He can not hold or exercise a trust as to other property owners, because no owner has any property right in the restriction or devotion of the street to certain public uses. Each owner is entitled to compensation if his property is damaged; and the consent by one owner to the laying of railroad tracks does not affect the claim of another for damages.

10. *PUBLIC POLICY—Contract for the Withdrawal of Opposition to Legislation.*—Where private property interests are involved and the opposition to a bill pending before a legislature is based upon contemplated damage to private property, a contract in consideration of the withdrawal of opposition, to pay an indemnity for the injury anticipated from the passage of the act, there being no concealment of the arrangement from the legislature or public, and no purpose to mislead, is valid and not opposed to public policy.

11. *PUBLIC POLICY—Contracts Otherwise Valid, etc.*—A contract otherwise valid is not, or does not become void because it will, by its abuse, operate to the public injury.

12. *PUBLIC POLICY—Contracts for Carrying Out Legislation.*—Contracts for the carrying out of which legislative action is necessary are not for that reason opposed to public policy and will be enforced.

13. *STREETS.—Tendency of the Consent of Adjacent Owners.*—The consent of property owners to the laying of street railroad tracks in a street, the fee of which is in the public, has no tendency to impose burdens upon any of the other owners of property upon the street.

14. *STREETS—Adjacent Owner—Compensation.*—When the property of an abutting owner is damaged by the construction of a horse railroad in front of his premises he is, under the provisions of the constitution, entitled to compensation. Thinking that such construction would be a damage to him he has a right, before, and as a condition of giving his consent to the laying of such tracks, to bargain and sell the right to damage his property, for the largest sum he can obtain.

15. *DAMAGES—Liquidated, and Penalties.*—Where an obligation provided that if the obligor should "violate the conditions of this obligation the sum of one hundred thousand dollars shall thereupon become due and payable to the said obligee, his heirs, executors, administrators or assigns, as liquidated damages therein," etc., it was held that the sum nominated was not in law liquidated damages, but merely a penalty.

16. *STREET RAILROAD COMPANIES—Corporate Charter.*—A street railroad company is, in many respects, a personal and private corporation, existing and managed for the benefit and profit of its shareholders, but it is also, in other respects, a public corporation, having public duties to discharge.

Doane v. Chicago City Ry. Co.

17. STREET RAILROAD COMPANY—*Power to Limit Its Sphere of Action.*—A street railroad company can not, by a contract with an individual, limit the sphere of its action, and contract that it will not in the future do that which the public interests may demand.

18. STREET RAILROAD COMPANY—*Power To Limit Its Sphere of Action—Illustration.*—The Chicago City Railway entered into an obligation "that it will not hereafter build, construct or lay any other or more than a single track railway, without switch or switches, turn-out or turn-outs, along any part of Wabash avenue, between Lake street and the north line of Madison street." *Held*, that the obligation was without binding force, as it was, in effect, a contract not to do that which, in the future, the public interests might demand.

Memorandum.—Debt on penal bond. In the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Judgment for defendant on demurrer to declaration; appeal by plaintiff. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 8, 1894.

STATEMENT OF THE CASE.

The Chicago City Railway Company was incorporated by a special act of legislature, approved February 14, 1859, entitled "An act to promote the construction of horse railways in the city of Chicago." (Pr. Laws 1859, page 530.)

By this act certain persons therein named and their successors were created a body corporate and politic, by the name of "The Chicago City Railway Company," for the term of twenty-five years. The corporation was authorized and empowered "to construct, maintain and operate a single or double track railway, with all necessary and convenient tracks for turn-outs, side tracks and appendages in the city of Chicago, and in, on, over and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the south or west divisions of the city of Chicago, as the common council of said city have authorized said corporators, or any of them, or shall authorize said corporation so to do, in such manner and upon such terms and conditions, and with such rights and privileges as the said common council has, or may, by contract with said parties, or any or either of them, prescribe."

November 16, 1863, appellee entered into an agreement

with the city of Chicago described in an ordinance of the city of Chicago, wherein it was provided that "Whereas, by an ordinance passed November 18, 1861, authority and consent were and are duly granted to, vested in and accepted by the Chicago City Railway Company, and its assigns, to construct single or double track horse railways in, upon and along certain streets of said city, and to use the same for the period in said ordinances mentioned, among which said streets so mentioned are Wabash avenue and Lake street, and whereas, it is deemed and considered by the common council of said city that the permanent interest and welfare of said city demand the exclusion of all such railways from said Wabash avenue, and from all of said Lake street, east of the east line of Peck Court," etc.

The Chicago City Railway Company, appellee, duly accepted the provisions of said ordinance, and thereby relinquished its right to place tracks in Wabash avenue.

February 6, 1865, the powers of appellee were enlarged by an act of the legislature concerning horse railways. Pr. Laws 1865, page 597.

This act is familiarly known as the ninety-nine years act, the charter of appellee being thereby extended for the term of ninety-nine years.

The second section of said act, after referring to appellee and the city of Chicago, contained the following: "All contracts, stipulations, licenses and undertakings, made, entered into or given, and as made or amended by and between the said common council and any one or more of the said corporations, respecting the location, use or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force during the life hereof, as valid and effectual, to all intents and purposes, as if made a part, and the same are hereby made a part, of said several acts."

The general law, enacted in 1872, under which the city of Chicago is incorporated, provides as follows: "The city council or board of trustees shall have no power to grant the use of, or the right to lay down any railroad tracks in

Doane v. Chicago City Ry. Co.

any street of the city, to any steam or horse railroad company, except upon a petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes."

May 10, 1881, appellee gave to appellant the following instrument:

"Know all men by these presents, that the Chicago City Railway Company, a corporation created by and existing under the laws of the State of Illinois, is held and firmly bound unto John W. Doane, of the city of Chicago, State of Illinois, his heirs, executors, administrators and assigns, in the penal sum of one hundred thousand dollars (\$100,000), for the payment of which sum, well and truly to be made, in lawful money of the United States, the said, the Chicago City Railway Company, binds itself, its successors and assigns.

In witness whereof, the said, the Chicago City Railway Company, by the authority and direction of its board of directors, has caused these presents to be signed by its president, and attested by its secretary, and its corporate seal affixed hereunto, this 10th day of May, A. D. 1881.

The conditions of this obligation are such, that whereas, the said railway company is desirous of obtaining from the city council of the city of Chicago authority and consent to lay its street railway track on Wabash avenue, in said city, from Lake street to Madison street, and whereas, it is necessary for said railway company to obtain the consent in writing therefor of certain property owners along the line of said proposed tracks, before applying to said council for such authority and consent to construct said proposed track, and whereas, the said John W. Doane is the owner of certain property along the line of said proposed tracks, from whom it is necessary to obtain such consent to construct said proposed tracks.

And whereas, said John W. Doane, upon the conditions hereinafter named, and to be kept and performed by said railway company, its successors and assigns, has given his written consent, as such property owner, to the laying and

construction of said proposed tracks on Wabash avenue, between said Lake street and Madison street, by said railway company. Now, therefore, in consideration of the consent of said Doane, given as aforesaid, and the further consideration of one dollar, in hand paid to said railway company, by said Doane, the receipt whereof is hereby acknowledged, the said, the Chicago City Railway Company, hereby agrees that it will not hereafter build, construct, or lay down any other, or more than a single track railway, without switch or switches, turnout or turnouts, along any part of said Wabash avenue, between said Lake street and the north line of said Madison street (except necessary curves to connect the said proposed track, on Wabash avenue, with the tracks of the Chicago West Division Railway on Randolph street, and also on Lake street, and to connect said proposed tracks with the tracks of the Chicago City Railway Company on Madison street), nor upon any part of Lake street, between Wabash avenue and State street, except the necessary curves to connect the tracks on said Lake street with the tracks of said City Railway Company on State street, and with the proposed tracks on Wabash avenue; without having first obtained the consent thereof, in writing, from the said J. W. Doane, his heirs, executors, administrators or assigns. And in the event that the said railway company, its successors or assigns, shall violate the conditions, or any of the conditions of this obligation, then the said sum of one hundred thousand dollars (\$100,000) shall thereupon become due and payable to the said Doane, his heirs, executors, administrators or assigns, as liquidated damages herein, otherwise this obligation to be null and void.

(Signed)

THE CHICAGO CITY RAILWAY COMPANY,

[SEAL.]

By S. B. COBB, Pres't.

Attest: W. N. EVANS, Sec."

APPELLANT'S BRIEF, JNO. N. JEWETT AND BENJAMIN F. AYER,
ATTORNEYS.

The burden is always on the assailant to show that a contract is in violation of the settled public policy of the

Doane v. Chicago City Ry. Co.

State; and no court will refuse its aid to enforce a contract on doubtful or uncertain grounds. The power should be exercised, like that of declaring a statute unconstitutional, only in cases free from doubt. *Swann v. Swann*, 21 Fed. Rep. 299; *Richmond v. Dubuque & S. C. R. R. Co.*, 26 Iowa, 191; *Richardson v. Mellish*, 2 Bing. 229.

The right of a land owner to damages when his property is injuriously affected by the construction of a railroad in the street in front of it, admits of no question. It is also settled by repeated decisions in this State, that if material alterations are made in the railway after it has been opened for use, which are not indicated on the plans submitted by the company when the damages were first assessed, the land owner is entitled to additional compensation for any injury to his property caused by the change. *Jacksonville & S. R. R. Co. v. Kidder*, 21 Ill. 131; *Peoria & R. I. R. R. Co. v. Birkett*, 62 Ill. 332; *Mix v. Lafayette, B. & M. R. R. Co.*, 67 Ill. 319; *Stone v. Fairbury, P. & N. W. R. R. Co.*, 68 Ill. 394; *Stack v. City of East St. Louis*, 85 Ill. 377; *Chi. & W. I. R. R. Co. v. Ayres*, 106 Ill. 511; *Wabash, St. L. & P. R. R. Co. v. McDougall*, 118 Ill. 229; same case, 126 Ill. 111; *Lake Erie & W. R. R. Co. v. Scott*, 132 Ill. 429; *Maltman v. Mil. & St. P. R. R. Co.*, 41 Ill. App. 229.

The parties interested are not obliged to go into court to have the damages assessed by a jury, but may lawfully agree upon the amount to be paid, and such agreements are binding. They may be made before, as well as after, the authority to construct the railway has been procured. An owner of land, whose interests are affected by a bill for a railway pending in parliament or in the legislature, has a right to oppose it, and may, because of his private interest, lawfully agree to abandon his opposition; and it is perfectly well settled that such an agreement is a good consideration for a contract to pay money. It is the common course in England for the parties to settle between themselves, the terms on which the land owner's consent shall be given to a bill for a railway which may damage his estate; and in that there is nothing illegal. *Edwards v. Grand Junction Ry. Co.*,

1 Myl. & Cr. 650; Stanley v. Chester & B. Ry. Co., 3 Myl. & Cr. 773; Lord Howden v. Simpson, 10 Ad. & El. 793; Simpson v. Lord Howden, 9 Cl. & Fi. 61; Capper v. Earl of Lindsey, 3 H. L. Cases, 293; Hawkes v. Eastern Counties Ry. Co., 1 DeG. M. & G. 737; Eastern Counties Ry. Co. v. Hawkes, 5 H. L. Cases, 331; Taylor v. Chichester & M. Ry. Co., L. R. 4 Eng. & Ir. Ap. Cases, 628; Weeks v. Lippincott, 42 Pa. St. 474; Low v. Conn. & P. River R. R. Co., 46 N. H. 284.

APPELLEE'S BRIEF, JULIUS S. GRINNELL, ATTORNEY.

Appellee contended that the bond in question is either an ingenious promise to present to plaintiff an immense sum, or it is a promise not to build two tracks on any part of Wabash avenue north of Madison street, in either case for the consideration of his consent, and in either case is void. As such promise it can not be enforced; it is illegal. C., M. & St. P. Ry. Co. v. Shea, 67 Iowa 723; 3 Am. & Eng. Enc. of Law, 878; Howard v. First Ind. Church of Baltimore, 18 Md. 451; McGuire v. Smock, 1 Wilson (42 Ind.) 97; Brown v. Brown, 34 Barb. 533; Cook v. Shipman, 24 Ill. 614; Marshall v. Railroad Company, 16 How. 314; Sedgwick v. Stanton, 14 N. Y. 289; Jacobs v. Tobiason, 65 Iowa, 247; Sharp v. Teese, 4 Halst. (N. J.) 352; Pingry v. Washburn, 1 Aiken (Vt.) 264.

The general authority of the directors of a corporation extends merely to the supervision and management of the company's ordinary or regular business. The above principle is a well settled one, recognized by the decisions and the text books. Morawetz on Private Corporations, Sec. 512; Am. & Eng. Enc., Vol. 4, page 207; Cook on Corporations, Sec. 664, *et seq.*; Beach on Private Corporations, Sec. 421, *et seq.*; Beach on the Law of Railways, Vol. 1, Sec. 525, *et seq.*; C. C. Ry. Co. v. Allerton, 18 Wal. 233.

In determining whether a contract is illegal, the entire contract on both sides will be considered, and if the consideration is illegal, no part of it will be enforced. One part can not be discharged and the other enforced. Williams v. R. R. Co., 53 Ia. 126; R. R. Co. v. Ryan, 11 Kan. 602; Mar-

Doane v. Chicago City Ry. Co.

shall v. R. R. Co., 64 Ill. 414; R. R. Co. v. Taylor, 6 Col. 1; "Public Policy" or "The Policy of the Law" defined in Am. and Eng. Enc. of Law, Vol. 9, page 880; Chicago Gas-Light Co. v. People's Gas-Light Co., 121 Ill. 530.

It was also contended that the amount stated in the bond is not liquidated damages.

The building and operating a track on Wabash avenue 200 or any number of feet north of Madison street, ought not to entitle him to the full penalty or sum named. Such sum is unreasonable much beyond "compensation," and is manifestly unfair if not outrageous and unconscionable, and besides such could not have been the intention of the parties. 5 Am. and Eng. Enc. 25; Bryton v. Marston, 33 Ill. App. 214; Scofield v. Tompkins, 95 Ill. 190.

Where the parties to a contract have fixed upon a certain sum as damages for its breach, the question whether the amount recovered is to be the sum named, or whether the actual damage is to be considered, depends upon whether the court construes the stipulated sum to be liquidated damages or a penalty.

The courts are guided in determining this question by the language used, the subject-matter of the contract, and the intention of the parties. The use of the words penalty and liquidated damages are not conclusive, although the word penalty *prima facie* excludes the notion of stipulated damages. 5 Am. and Eng. Enc. of Law, 24; Pierce v. Jung, 10 Wis. 30; Pennypacker v. Jones, 106 Pa. St. 237; Davis v. Gillett, 52 N. H. 126; 2d Wait's Actions and Defences, 437; Higginson v. Weld, 14 Gray, 173; Schrimpf v. Tenn. Mfg. Co., 86 Tenn. 219; Hamaker v. Schroers, 49 Mo. 406; Dennis v. Cummings, 3 Johnson's Cases, 297; Stearns v. Barrett, 1 Pick. 451; Gower v. Saltmarsh, 11 Mo. 271; Richardson v. Woehler, 26 Mich. 90; Sedgwick on Damages, Sec. 389, *et seq.*

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Under the conditions existing when this contract was made, before appellee could lay any track in Wabash avenue

it was necessary that it obtain the consent of the owners of more than one-half of the frontage on that portion of the street along which it proposed to construct its railway.

The assent of appellant was therefore of value to it; a thing for which it might reasonably be willing to pay compensation; as its right to pay compensation is in this case disputed, the question of the right to pay and to receive a reward, pecuniary or personal, is first to be considered.

The streets of a city are for the use of the public, in whom is vested the right of control over them.

Those who represent the public, as the legislature of the State or the authorities of cities, must, in whatever they do in respect to public ways and grounds, be guided solely by a regard for the public interests; but they may, and frequently do, grant to individuals special rights and privileges in respect to such ways and grounds, doing so because it is believed thereby the public interests will be conserved. The city council of Chicago has only such control over its streets as has been given to it by the State. In 1872, the State saw fit to refuse to give to city authorities the right to permit horse railways to be constructed in the streets of cities, except upon the petition of the owners of a majority of the frontage before which such railway should be laid.

In so doing the State did not, by refusing to completely transfer its control in this regard over public streets, impose upon the owners of abutting property any trust, or charge them with discharge of any public duty. The State might have, and has, vested in the city a trust in respect to the use of its streets; but it could not vest in one or more private property holders the power to exercise in the interest and for the benefit of the public, a discretion as to what use should be made of the public streets. There is in the framework of our State no warrant for bestowing upon property owners, as such, any of the functions of government. The representatives of the people are, under the constitution of this State, selected without reference to property qualifications.

The respective owners of private property fronting on

Wabash avenue are not a public body; they neither hold nor exercise legislative, executive or judicial functions; they are not directly or indirectly selected by the people or removable by them. They are chargeable with no more duties to the public than are the tenants who occupy their buildings, or the customers who frequent their stores.

If they give or withhold their consent to the construction of a street railway before their doors, they do so not in any public capacity, as servants or agents of the public, but as individuals, having regard solely to their individual interests, neither acting collectively nor in concert, nor after discussion and consideration, but independently and with reference, each for himself, to what he deems for his personal interest.

They might all be stockholders and directors in the company to which they gave such consent; might completely own and control it and yet their consent be not rendered invalid; because they have in this matter no public interest to protect or serve.

The expediency of giving to property owners, as such, the power to prevent the devotion of public streets to such uses as the public good may require, is not a matter for the consideration of the court.

In giving or withholding this consent, one owner may override the objections of a thousand, whose united possessions do not equal his. The law does not require that in giving or withholding consent, the property owner shall be governed by any sense of duty to others; he is not selected by his fellow property owners, has taken no oath of office, entered into no obligation, and may be influenced by a consideration of benefit or harm to lands by him owned upon other streets, or to the stock of the corporation seeking to obtain the right of user or stock in other companies whose interests are opposed to such use. Pecuniary considerations, other than the payment of money to him, may be all-powerful with him, and yet neither the public nor individuals have against him any cause for complaint.

The law neither provides nor contemplates any means of determining why any owner gives or refuses consent or any

remedy for his doing either. If, as is urged, there is imposed upon each property owner a duty toward all others who own property upon the street, then it would seem that the *cestui que trusts* must have a remedy for a refusal to perform such duty, or at least, for an abuse of discretion. It is manifest that no property owner can be compelled to give his consent. One property owner can not hold or exercise a trust as to other property owners, because no owner has any property right in the restriction or devotion of the street to certain public uses. Each owner is entitled to compensation if his property is damaged; and the consent by one owner to the laying of railroad tracks does not affect the claim of another for damages.

The case of paying compensation to a property owner for giving or withholding his consent is not like that of a bribe to an elector to give or withhold his vote at a public election. The elector has a right to vote because he is a freeman; not because he is the owner of property fronting upon a certain street. The vote of an elector, be he rich or poor, has the same weight. The consent or refusal of the holder of a mile of frontage counts 264 times as much as that of the owner of a twenty-foot lot.

In the case of the freeman at an election, there is an appeal to his manhood; when the consent of a property holder is asked, there is presented to him only his pecuniary interest. The freeman can not barter his right to vote, the property owner may any day dispose of his frontage, and thus deprive himself of all power to consent or refuse.

It has repeatedly been held that where private property interests are involved and the opposition to a bill pending before a legislature is based upon contemplated damage to private property, a contract in consideration of the withdrawal of opposition, to pay an indemnity for the injury anticipated from the passage of the act, there being no concealment of the arrangement from the legislature or public, and no purpose to mislead, is valid and not opposed to public policy. *Low v. Railroad*, 46 N. H. 284-293; *Taylor v. Chichester M. Ry. Co., L. R., 4 Eng. & Ir. Ap. Cases*, 658;

Doane v. Chicago City Ry. Co.

Sampson v. Lord Howden, 9 Cl. & Finn. 61; Edwards v. The Grand Junction Ry. Co., 1 My. & Cr. 650-667; Stanley v. Chester & Birkenhead Ry. Co., 3 My. & Cr. 773-782; Carter v. Earl of Lindsay, 3 H. L. Cases, 293; Hawkes v. The Eastern Counties Ry. Co., 1 De G., M. & G. (50 Eng. Ch.) 737.

In so far as the English cases above cited hold that an agreement with an individual who is a member of the legislature, to withdraw his opposition as an individual to any measure pending before such body, is valid, it is not likely they would be followed in this country, although it might be found, as in the English cases, that there was no agreement to influence the legislator's vote.

A contract otherwise valid, is not or does not become void because it will, by its abuse, operate to the public injury. Rule * * * Greenhood on Public Policy, page 27; Commonwealth v. Delaware & Hudson Canal Co., 43 Penn. St. 295; Ambrose v. Root, 11 Ill. 497.

The fact that appellant's consent was obtained before the permission of the council was obtained, and without such permission the promise would not become operative, does not invalidate it.

Contracts, to the carrying out of which legislative action is necessary, are not for that reason opposed to public policy and will be enforced.

In Cross v. The Pinckneyville Mill Company, 17 Ill. 54, it appeared that Cross had made a subscription for stock about one month before any effort was made to incorporate the company. A charter having afterward been obtained from the legislature, the company brought suit upon the subscription; a recovery for the amount thereof was sustained.

So a subscription toward the erection of a building for a female university, conditioned that it should be located in the city of Knoxville, although made before the incorporation by the legislature of such university, was, after the granting of a charter to it, locating it at Knoxville, held to be collectible. Johnson v. Ewing Female University, 35 Ill. 518.

In *Cross v. The Pinckneyville Mill Co.*, *supra*, the court say that the true and correct rule is laid down in *Kidwelly Canal Company v. Raby*, 2 Price R. 93; in that case, Richards, Baron, said:

"One of the necessary means for carrying into execution the plan, toward which the persons whose names appear on this paper have subscribed, was the procuring of an act of parliament. That was a necessary step and must therefore be upheld. Raby was a subscriber to this paper, and is bound by its terms to accept every measure necessary to its execution."

In *Thompson v. Board of Supervisors*, 40 Ill. 379, a promise had been made to pay money for the erection of a county building, conditioned that an election be held and the people should thereat decide in favor of the location of the county seat at the town of Aledo, it being shown that the promisor owned a large quantity of land at the contemplated county seat; the judgment rendered for the payment so promised, was upheld.

The consent of property owners to the laying of street railroad tracks in a street, the fee of which is in the public, has no tendency to impose any burden upon any of the other owners of property upon the street. The case is therefore not like those of *Howard v. First Independent Church of Baltimore*, Md., 18 Md. 451; *McGuire et al. v. Smock et al.*, 42 Ind. 1, or *C. M. & St. Paul R. R. Co. v. Shea*, 67 Iowa, 723.

If the property of appellant was damaged by the construction of a horse railroad in front of his premises, he was, under the provisions of the constitution of this State, entitled to compensation. Thinking that such construction would be a damage to him, he had a right, before, and as a condition of giving his consent to the laying of such tracks, to bargain and sell the right to damage his property, for the largest sum he could obtain.

It is urged by appellant that the sum named, \$100,000, is not a penalty. It is denominated, in the bond, "liquidated damages." We do not think it can be so regarded.

In *Goodyear Shoe Machinery Company v. Selz, Schwab*

& Co., Chicago Legal News of December 2, 1893, this court said :

“The question presented to a court when asked to enforce the payment of stipulated damages is, first, is the amount reasonably compensatory, or is it a mere penalty, having no relation to the injury actually suffered? if the amount, so stipulated, is such that it violates the fundamental rule of compensation, it will be treated as a penalty, and this without reference to the name which may be given to what is obviously nothing but a penalty.

To the doctrine thus announced we adhere; and in accordance therewith the sum of \$100,000, called liquidated damages, we find to be a penalty. There is nothing in the instrument, save the mere name given to this sum, tending in any way to show that this amount is or was thought to be reasonably compensatory; no such allegation is made in the declaration filed in this case, while the contents of the bond as a whole, indicate to the contrary.

The question then arises whether appellee could, at the date of this instrument, make a valid stipulation, under a certain penalty, that it would not at any time in the future place more than one track on Wabash avenue.

It is true that at the time this bond was given, appellee was under no obligation to place there any track at all, and that in 1863, it had been declared by the city that it was not for the public interest that a track be laid in this place, and in consequence thereof appellee had, by agreement with the city, relinquished all right that it then, in 1863, had to place there a track; but this arrangement was one which could at any time be abrogated by mutual consent; and it must be presumed that whenever the common council thereafter consented to the placing of tracks on Wabash avenue, that public interest, at least, was not then averse to the existence of street railroad tracks in that street.

Chicago is a city in which great changes have taken place. What use was, in respect to certain streets, for the public good at one time has ceased to be so at others, and it is in the nature of things impossible that in 1863 or 1881 it could be known that for all future time the laying of one or more

street railroad tracks in Wabash avenue in front of the premises of appellant would be averse to the public interest.

If the Chicago City Railroad Company could make a valid stipulation with appellee in respect to the laying of tracks in Wabash avenue, we see no reason why it might not have made such agreement as to any other number of streets, and, thus, under onerous pains and penalties, have disabled itself for all future time from the doing of that which not only its own interests but the interests of the public, which is the thing to be considered, might have demanded.

The penalty was to be paid, if more than one track was laid, although the State might abrogate the restrictive provision of the act of 1872, and vest in the city government the right, without consent of property owners, to give permission to appellee to lay two tracks in Wabash avenue between Madison and Lake streets.

It is true, as is urged, that the appellee is in many respects a personal and private corporation, existing and managed for the benefit and profit of its shareholders, but it is also in other respects a public corporation, having public duties to discharge, and it is alone because of its undertaking to perform public duties that it was called into existence and has obtained the valuable rights it possesses.

Such a corporation can not, by a contract with an individual, limit the sphere of its action, and contract that it will not, in the future, do that which the public interests may demand.

It is immaterial that appellee did not have, at the time it gave this bond, the right to lay any track in Wabash avenue. It was in a position where it might acquire such right, and it was evident that the time might come when its own interests, as well as those of the public, would demand that it obtain and exercise such right. It was therefore disabled from entering into a contract with appellants that it would not do so. *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Ill. 530; *Hays v. R. R. Co.*, 61 Ill. 422; *Peoria & Rock Island R. R. Co. v. C. V. Mining Co.*, 68 Ill. 489; *Marsh v. Ry. Co.*, 64 Ill. 414; *St. Louis, Jackson-ville & Chicago R. R. Co. v. Mathews*, 71 Ill. 592; *St. Louis,*

Jacksonville & Chicago R. R. Co. v. Mathews, 104 Ill. 257; Thomas v. R. R. Co., 101 U. S. 83; The State v. Hartford & New Haven R. R. Co., 29 Conn. 538; H. & N. H. R. R. Co. v. N. Y. & N. H. R. R. Co., 3 Robertson (101 U. S.) 83.

Appellee was entitled to demand and receive compensation as a condition for his assent to and petition for the laying of street railroad tracks in Wabash avenue. It is manifest from this bond that both of the parties thereto expected that he would be paid for giving such consent. It is not urged that he is not, upon this instrument, entitled to recover from appellee whatever actual damage he has sustained from the laying of such tracks, but we do not think, as is urged by appellant, that he can, under the declaration filed in this case, recover such actual damages, if any there are. No actual damages are alleged in the declaration to have been sustained, and the court could not, under the pleadings in this case, enter upon the consideration of anything, but whether, under the allegations there made, the plaintiff was entitled to recover the penalty of \$100,000 stipulated to be paid upon the laying of more than one track in Wabash avenue, between Lake street and the north line of Madison street.

The judgment of the Circuit Court sustaining the demurrer to the declaration is affirmed.

MR. JUSTICE GARY.

I assent to the conclusion in this case upon a single ground, that an agreement by a corporation exercising a franchise for the public convenience, that it will not exercise it where the convenience may be thereby promoted, is invalid.

The brief of the appellant invites us to take notice of the *locus in quo*, and we know that the agreement is in restraint of the exercise of the franchise along two blocks, other than the one where the property of the appellant is. Suppose that restraint were on the whole length, within the city, of Archer avenue; the question would be the same as now, differing, not in principle, but degree.

Booth et al. v. Koehler.

1. CERTIORARI—*When it Lies*.—If a judgment is not the result of negligence in the person against whom it is rendered, if it is unjust, and if it is not in his power to appeal in the ordinary way, he may sue out a *certiorari*—Sec. 76, Ch. 79, Justices—and have a trial *de novo*.

2. EQUITY JURISDICTION—*When There is a Remedy at Law*.—A court of equity will never lend its aid where there is an adequate remedy at law.

Memorandum.—Bill to restrain the collection of a judgment. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded with directions. Opinion filed January 11, 1894.

The opinion states the case.

RUFUS KING and GEO. P. SMITH, attorneys for appellants.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

On the 4th day of November, 1892, Miss Butler, one of the appellants, recovered a judgment before a justice of the peace against the appellee. On the 29th of the same month, the appellee filed a bill in chancery against the appellants, and on the 1st day of March following, a final decree was entered perpetually enjoining the collection of the judgment, with costs against Booth.

No inquiry as to the regularity or justice of that judgment is necessary. If the judgment was not the result of negligence in the appellee, if it was unjust, and if it was not in his power to appeal in the ordinary way, the appellee might have sued out a *certiorari* (Sec. 76, Ch. 69, Justices), and had a trial *de novo*. *Gallimore v. Dazey*, 12 Ill. 143.

Having this remedy at law, the appellee had no standing in equity. *Geraty v. Druiding*, 44 Ill. App. 440; *Harding v. Hawkins*, 141 Ill. 572.

"A court of equity will never lend its aid where there is an adequate remedy at law." *Durand v. Gray*, 129 Ill. 9.

Unless all the elements which would entitle him to a *cer-*

51 370

51 400

51 370

88 53

51 370

97 569

Schwartz v. Karlovsky.

tiorari concurred, the appellee had no claim upon the aid of a court of equity, and if they did concur, he had no need of it.

The decree of the Superior Court is reversed, and the cause remanded with directions to the Superior Court to dismiss the bill at the cost of the appellee.

MR. JUSTICE GARY ON PETITION FOR REHEARING.

The practice of paying no attention to a case which is pending, and applying for a rehearing after an adverse decision, is not to be encouraged. Even if we knew all the law part of the time, and part of the law all the time, yet we might not know all the law all the time, and may reasonably expect the aid of the counsel who have made a special study of the particular case.

The appellee filed no brief. His petition now cites *Propst v. Meadows*, 13 Ill. 157. In that case the complainant had made the utmost possible exertion to find his remedy at law, by *certiorari*, and in the view of the Supreme Court, had brought himself within the rule that equity will interfere "only when courts of law can not grant adequate relief." The only doubt that can arise as to the correctness of that decision is as to the application of the rule to a case where ignorance of the party prevented the remedy at law—a feature not in this case. Extreme cases make bad law, and are not to be strained.

In none of the other cases cited does the neglect to sue out a *certiorari* figure. Rehearing denied.

Schwartz et al. v. Karlovsky.

1. BILL OF EXCEPTIONS—*Records*.—The instructions and motion for a new trial must be incorporated into the bill of exceptions if it is desired to make them a part of the record.

2. RECORD—*Not to Be Made by the Clerk*.—A clerk can not make that which is not legally a part of the record, so by transcribing it into the record. The trial court makes the record; it is the duty of the clerk merely to transcribe it.

51	371
51	290
51	371
60	617

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

B. M. SHAFFNER, attorney for appellants.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellants upon two promissory notes and recovered judgment for the amount of the notes and interest.

The appellants claimed that in other dealings the amount was reduced to a fraction of the amount recovered. The question was one of fact, and we can not review the verdict:

First. Because the bill of exceptions is not a part of the record here; the stipulation being like several others in cases we have decided, of which Zielinski v. Remus, 46 Ill. App. 596, is the earliest, and Mason v. Strong, 51 Ill. App. 482, the latest.

Second. Because, even if we could regard the bill of exceptions, the only exception taken on the trial was to refusing to permit an answer to a question by the counsel of the appellants, and the same question, in effect, was put by the counsel of the appellee soon after, and answered by the same witness; and the instructions, and motion for a new trial, are not in the bill.

It is true that as to the motion for a new trial the bill does say "heretofore copied into this record" and the clerk has, preceding the bill of exceptions, put in what he says was a motion "filed."

Now it is almost certain that the motion had not been "copied" anywhere when the bill was signed, and surely not into the record for this court, of which the clerk could not make it a part. Wilson v. Wilson, 44 Ill. App. 209.

There is nothing for us to do but to affirm the judgment.

Giddings v. McCumber.

51	373
68	466
51	373
70	661
51	373
106	*601

1. EVIDENCE—*Plea Denying Indorsement.*—In a suit upon a promissory note the defendant denied an alleged indorsement thereon by a partnership, by a verified plea; a witness testified that he was one of the partners composing the firm and that the indorsement by the firm was his signature: *held* that the testimony being uncontradicted, disproved the plea denying the indorsement.

2. PROMISSORY NOTES—*Recovery Under the Common Counts.*—If a plaintiff can show title to the note sued on, he can recover under the common counts.

3. PROMISSORY NOTES—*Holder's Right to Recover.*—The holder of a bill or promissory note, indorsed in blank by the payee, may recover on it, notwithstanding there were subsequent indorsements in full upon it. He may strike them out or not, as he pleases.

4. USURY—*Note Made in a Foreign State.*—To make the defense of usury to a note made in Dakota, the defendant should plead the statute of Dakota, if there be one, which the note violated. Without such a statute there could be no defense, for "usury is illegal only as it is made so by statute."

5. INSTRUCTIONS—*Must be in Writing.*—Where the court said to the jury, "Gentlemen, there is no defense in this case; just sign your names to this form;" *it was held*, under the statute prohibiting oral instructions, to be indefensible.

6. INSTRUCTIONS—*Exceptions to.*—An exception to an instruction may be to the manner of giving it or to the matter of the instruction.

7. PAYMENTS—*Indorsement on a Note—Presumptions.*—In the case of an indorsement upon a promissory note, the presumption is that it is made by, or with the assent of, some holder of the note at the time the indorsement was made. The universal understanding is that the safest evidence of a partial payment is an indorsement of it upon the instrument showing the duty to pay. To decide that the party holding and suing upon the instrument may, without any explanation, or proof of mistake, or anything else rebutting the presumption arising from the indorsement, destroy that evidence and recover the whole sum originally promised, would shock the common sense of all business men.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded upon condition of the refusal to remit a portion of the judgment. Opinion filed February 8, 1894.

The statement of facts is contained in the opinion of the court.

MILLER & STARR and LORENZO C. BROOKS, attorneys for appellant.

WILBER, ELDRIDGE & PINNEY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Instead of considering separately the dozen different reasons urged by the appellant why the judgment should be reversed, we shall show why the appellee was entitled to recover.

The suit was upon a promissory note, a copy of which, and of the indorsements is:

"\$400. WAHPETON, DAKOTA, February 23, 1886.

Four months after date, for value received, I promise to pay to the order of Richland County Loan Association, four hundred dollars, with interest at the rate of twelve per cent per annum, before and after maturity. Payable at the First National Bank of Wahpeton.

F. C. GIDDINGS."

Indorsements:

"Demand and notice of non-payment hereby waived.

RICHLAND COUNTY LOAN ASSOCIATION,

JOHN JOHNSTON, Pres't."

"Without recourse, pay to the order of P. J. McCumber.

C. F. SIBLEY, Receiver,

First National Bank of Wahpeton."

"Forty and thirty-four one hundredths dollars paid on the within on account of dividends paid. Last dividend paid, two per cent, March 20, 1890."

Indorsement erased:

"One hundred and six and eighty one hundredths dollars paid on the within on account of dividends paid. Last dividend two per cent, declared March 20, 1890."

The declaration contained a special count upon the note, but variant from it, alleging the indorsements by the Richland County Loan Association and the First National Bank of Wahpeton, and also the common counts. Both the indorsements alleged were denied by verified pleas.

John Johnston was a witness and in effect testified that he and two partners were a firm in the real estate and loan business, as the Richland County Land Association; all three transacted the business; and that the indorsement by that association was his signature. That testimony being contradicted, disproved the plea denying that indorsement.

If the appellee could show title to the note he could recover under the common counts; *Gilmore v. Nowland*, 26 Ill. 200; and the first indorsement being in blank, he could claim under that and disregard all that followed it. "The holder of a bill or promissory note, indorsed in blank by the payee, might recover on it, notwithstanding there were subsequent indorsements in full upon it, and he might strike them out or not, as he pleases." *Huie v. Bailey*, 16 Louisiana 213; *Walker v. MacDonald*, 2 Exch. 527.

If he might disregard indorsements in full, *a fortiori*, he may if they are in blank.

No question of usury arises on this record; it was not pleaded. Sec. 7, Ch. 74, Interest.

To make that defense, the appellant should have pleaded the statute of Dakota, if there be one, which this note violates.

Without such a statute there could be no such defense for "usury is illegal only as it is made so by the statute." *Tyler on Usury*, 65.

In England for forty years the liberty of contract in relation to interest has been the same as upon any other subject. Ch. 90, 17 and 18 Victoria, L. J. Stat. 1853-4.

The interrogatories to Johnston on cross-examination, to which objections were sustained, were unaccompanied by any offer as to what would be proved, and therefore no question can now be made on them. *Gaffield v. Scott*, 33 Ill. App. 317.

There was nothing to argue to the jury, or on motion for a new trial, and the haste of the court, not excepted to, would be no ground of complaint if it were. But the court said to the jury, "Gentlemen, there is no defense in this case; just sign your names to this form;" which was, under the statute prohibiting oral instructions, indefensible.

The appellant "excepted to the instructions so given to the jury." Such an exception may be to the manner of giving, or to the matter of, the instruction. If ambiguous, the construction least favorable to the appellant is to be adopted. *Rogers v. Hall*, 3 Scam. 6, has been cited and followed many times by this court. But the court followed this oral instruction with a written one to find a verdict for the appellee for \$711.46. This was error. The erased indorsement, if it had remained unerased, would have been evidence of part payment. *Long v. Kingdon*, 25 Ill. 66.

The presumption is that it was made by, or with the assent of, some holder of the note at the time the indorsement was made. The universal understanding is that the safest evidence of a partial payment is an indorsement of it upon the instrument showing the duty to pay. To decide that the party holding and suing upon the instrument may, without any explanation or proof of mistake, or anything else rebutting the presumption arising from the indorsement, destroy that evidence and recover the whole sum originally promised, would shock the common sense of all business men.

The appellant called the attention of the court specially to the erased indorsement as a credit to be allowed, but the court refused to instruct the jury to allow it. This error affects only the amount recovered. If the appellee will, within two days after this opinion is filed, remit the amount of that credit, the judgment will be affirmed for the residue, otherwise reversed and the cause remanded; in either case the costs will fall on the appellee. *Standard Fashion Co. v. Blake*, 51 Ill. App. 233.

No new computation of interest is necessary, as the amount of credits by both indorsements did not equal the then accrued interest. *McFadden v. Forties*, 20 Ill. 509.

Metzger v. Huntington.

Metzger v. Huntington.

1. **SERVICE OF PROCESS**—*Read to Wrong Person, but in Presence of the Right.*—Where a summons is read in the hearing of a defendant, though the officer addressed himself to his clerk, both the clerk and he being aware of the officer's mistake, *it was held* that as what is read in the hearing of several persons, is read to all of them, even though the reader addresses only one specially, the service was sufficient.

2. **INSTRUCTIONS**—*Should be Accurately Drawn.*—On the trial of a plea in abatement, that the defendant, W. M., had not been served with process, the court refused to instruct the jury: "If you believe from the evidence that J. G. C. was a legally appointed deputy sheriff, and was acting in that capacity upon the seventh day of April, 1893, and that upon that day he read the summons introduced in evidence to G. R., a bookkeeper in the office of W. M., and at that time, nor at any other time did he read said writ to W. M., then your verdict should be for the defendant." *It was held*, rightfully refused, even if it meant what it was intended to mean; but, "at that time, nor at any other time, did he read," etc., are not words that negative reading "at that time;" probably the writer meant to put "neither" before them.

3. **VERDICT**—*Form of, in Abatement.*—In the trial of an issue in abatement, the jury returned the following verdict: "We, the jury, find the issues for the plaintiff." *It was held* to be proper, as the issue was not for damages.

Memorandum.—Abatement to the service of process. Error to the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

L. H. BISBEE and W. N. GEMMILL, attorneys for plaintiff in error.

BRIEF FOR DEFENDANT IN ERROR, DEFREES, BRACE & RITTER,
ATTORNEYS.

It was generally held in England that anything which brought home personal knowledge of the writ to the defendant, constituted a good personal service. *Williams v. Pigott*, 1 M. and W. 573; *Rhoades v. Innes*, 7 Bing. 329; *Phillips v. Ensell*, 2 Dowl. P. C. 684.

The jury having found that the defendant was duly served, the next question which arose was as to the kind of judgment which should be entered—the plaintiff demanding judgment *quod recuperet*, and the defendant insisting that the judgment should be *respondeat ouster*.

The court assessed the damages and entered judgment for the plaintiff for the amount of the judgment, and for damages in an amount equal to the interest thereon.

Where an issue of fact is made by plea in abatement and the verdict is for the plaintiff, the judgment to be entered on the verdict is final—*quod recuperet*. 1 Saunders' P. and E. 5 (4th Am. Ed.); Stephen's Pleading, 104; 1 Tidd's Practice, 640 (4th Am. Ed.); Gould's Pleading, 277; 1 Chitty's Pleading, 464.

This is the practice in Illinois. Moeller v. Quarrier, 14 Ill. 280; Brown v. Ill. C. M. Ins. Co., 42 Ill. 366; Goggin v. O'Donnell, 62 Ill. 66; Greer v. Young, 120 Ill. 184-191; Rubel v. Beaver Falls Co., 22 Fed. Rep. 282.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This was an action upon a judgment in Indiana, in favor of the defendant in error against the plaintiff in error, who pleaded in abatement that he was not served with process in this action.

The jury found against him upon evidence conflicting, it is true, but which upon one side justified the conclusion that the summons was read in his hearing, though the officer addressed himself to Metzger's clerk; both the clerk and Metzger being aware that the officer thought that the clerk was Metzger. No authority is cited or argument made that evidence of such service would falsify the return of service.

It is doing no violence to the English language to say that what is read in the hearing of several persons, is read to all of them, even though the reader addresses only one specially.

The plaintiff in error asked, and excepted to the refusal, of this instruction:

"The jury are instructed that if you believe from the evi-

Metzger v. Huntington.

dence that John G. Campbell was a legally appointed deputy sheriff, and was acting in that capacity upon the seventh day of April, 1893, and that upon that day he read the summons introduced in evidence to George Robertson, a bookkeeper in the office of William G. Metzger, and at that time, nor at any other time did he read said writ to William G. Metzger, then your verdict should be for the defendant."

This was rightfully refused even if it meant what it was intended to mean; but "at that time, nor at any other time, did he read," etc., are not words that negative reading "at that time;" probably the writer meant to put "neither" before them. The serious question of law in the case arises upon the verdict and subsequent action of the court.

The verdict was: "We, the jury, find the issues for the plaintiff." Had the action been for damages, this verdict would have been a nullity, as the same jury should have assessed them. *Boggs v. Bindschoff*, 23 Ill. 66; *Moeller v. Quarrier*, 14 Ill. 280.

These are cases under former statutes when the traverse of the affidavit in attachment was in abatement, but the same rule obtains when the summons is attacked for extrinsic matter in abatement. *Green v. Young*, 120 Ill. 184.

Strictly, even on an indictment for a misdemeanor, if the defendant plead in abatement, and it be found against him, that is the end of his defense, and the court proceeds to judgment. *Schram v. People*, 29 Ill. 162.

Here the action was not for damages, but for a debt of record. With the existence of that record the jury had no concern. It was a matter upon which the court only could pass. 2 Tidd, 741 *et seq.*, and notes.

The jury having done all for which they were competent, it necessarily followed that the court must do the rest. *Rust v. Frothingham*, Breese, 331.

These views dispose of all questions made in the case and the judgment is affirmed.

Bonney v. Weir & Craig Mfg. Co.

1. JURY—*Judges of the Testimony, etc.—Instruction Erroneous, etc.*—The jury are the sole judges of the weight to be given to the testimony of the witnesses and an instruction which invades their province in any respect is erroneous.

2. INSTRUCTIONS—*Relieving the Plaintiff of the Burden of Proof.*—An instruction which intimates that the verdict should be for the appellee if the defense stated was not successful is erroneous.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

LYMAN M. PAINE, attorney for appellant.

PADDEN & GRIDLEY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant was secretary of a building association. One Wloch conveyed to Bonney a lot subject to a mortgage to the association, and the question in this case is whether, as part of the purchase price, Bonney promised to pay to the appellee a judgment it had against Wloch. There is conflicting evidence upon that, but the points to be passed on here are upon the instructions. Wloch having testified that Bonney promised to pay the judgment of the appellee, as well as another one, continued: "After I signed that deed Mr. Bonney took \$50 and gave it to Burnette, and says: 'You go with Wloch to his house for Mrs. Wloch to sign that deed, and after she signs that deed explain to her what is going on, and that we pay those judgments; that Mr. Wloch will have no more bother with anything.' I went with Mr. Burnette to my house, and he said to my wife, 'Mrs. Wloch, sign that deed and we will pay those judgments what is against your husband.' She did not intend to sign in the

Bonney v. Weir & Craig Mfg. Co.

first place, and after he explained it to her, she said, 'All right, if you will pay those judgments, well, then I will sign it,' and so she did."

That Burnette was sent with the \$50 to procure the signature and acknowledgment of Mrs. Wloch to the deed, is undisputed; but as to any authority to him to do anything more, there is no testimony other than what is quoted.

The court instructed the jury, at the instance of the appellee, as follows:

"2. The jury are instructed that if they believe from the evidence that the defendant, in all his conversations and negotiations with the witnesses, Wloch and wife, was acting in his capacity as secretary for the Douglas Park Building Association, and for such association; and not at all for himself, then the verdict must be for the defendant. But the jury are further instructed that in order to take advantage of this defense, the defendant must show by the evidence that the said witnesses, Wloch and wife, were informed, or had knowledge of the fact that said Bonney was acting for said association, and not for himself.

3. The court instructs the jury that the law is that one who, in respect to another, so conducts himself or his business that third parties are entitled to deem the other his agent, with powers extending to the matters in question, is, as to third parties dealing with the supposed agent, estopped to deny the agency; in other words, is bound by the seemingly authorized agent as though the authority were real; and the court further instructs the jury that if they believe from the evidence that the defendant, Bonney, placed the notary, H. L. Burnette, in such a position that Wloch and wife were justified in believing, and did believe, that said Burnette was the agent of Bonney, then said Bonney is bound by any promises or agreements that said Burnette may have made while acting apparently as such agent, if you further believe he made any promise or agreement in connection with the matter of such apparent agency."

The first of these instructions very strongly intimates that the verdict should be for the appellee, if the defense stated was not successful.

The other instruction, however, is more harmful.

There is no evidence that Mrs. Wloch ever saw Bonney, and therefore there was nothing to justify her in believing that Burnette was the agent of Bonney, and the testimony of Wloch which, as before said, is all there is upon the subject, does not tend to establish any agency of Burnette to make promises and agreements. The effect of the instruction was to give to the testimony of Mrs. Wloch that Burnette promised payment of the judgment as much weight as if she had testified that Bonney had promised. The alleged promise to pay the judgment being the only thing in dispute, her testimony was irrelevant.

Had the controversy been why she signed and acknowledged, her testimony might have been admissible; but that question is not before us.

The judgment is reversed and the cause remanded.

Harris v. Shebeck, etc., by his Next Friend.

1. RECORD—*Stipulation as to Bill of Exceptions.*—Where the certificate of the clerk to the transcript of the record is that the original bill of exceptions "is incorporated herein by stipulation of the parties," and the stipulation itself, entitled in the cause as it was below, in the Circuit Court, stipulated that the bill of exceptions "may be incorporated in the record and be made a part thereof," it was held that such words do not make the bill a part of the record in the Appellate Court.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

NEWELL & CAMP and A. B. WILSON, attorneys for appellant.

J. F. KOHOUT, attorney for appellee.

Harris v. Shebeck.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Shebeck, a boy fifteen years old, began to work for Harris February 18, 1891, and on the 20th was so injured that the four fingers of his left hand were amputated. For this injury he sued and recovered. There is no question as to the amount of damages; only as to the right to recover at all. If we might read what purports to be a bill of exceptions, we should find that Harris had a factory in which was machinery. Along the north side of a large room on the third floor was a clear space by which the workmen passed to and fro between the stairs on the west side of the room and the door into a smaller room to the east. South of and near to this room was a machine having cog wheels, extending southward along the east side of the large room.

Shebeck says that on the morning of the 20th, he being at work in the smaller room was ordered by the foreman to the larger room; that the foreman went first, and having gone southwardly into the larger room a considerable distance, called to Shebeck, when he was at the door, to hurry; that the light was dim, and in obeying the order of the foreman in going toward him, Shebeck fell over a pile of castings left on the floor, and putting out his left hand as he was falling, it was caught by the cogs of the machine.

Whatever conflict there may be in the testimony as to the pile of castings being there, was for the jury to decide upon, and if they found the pile was there, then the question of the negligence of the respective parties was also for them. That the cogs of the running machine might be a peril which could easily have been guarded against, and that suffering the floor to be incumbered at a place where Shebeck would naturally go in obeying the foreman's order, added to the peril, were considerations which were doubtless urged on the trial.

Observation teaches that a poor boy hurt in a factory does not need a very strong case to get a verdict, and that any instructions, short of a peremptory one to find for the defendant, have little influence upon the result.

But the bill of exceptions is no part of the record here.

The certificate of the clerk to the transcript is that the original bill of exceptions "is incorporated herein by stipulation of the parties." Turning to the stipulation itself we find it to be one entitled in the cause as it was below and in the Circuit Court, to all of which there is no objection, and stipulating that the bill "may be incorporated in the record and be made a part thereof."

We have heretofore held that such words do not make the bill a part of the record here and refer to these cases for the reasons: *Zielinski v. Remus*, 46 Ill. App. 596; *Rohde v. Lehman*, 50 Ill. App. 455.

There is the less regret in thus holding, "a result, so far as appellant is concerned, having been reached which is as favorable to" him "as any that can be expected." *North Chicago S. Ry. Co. v. Cook*, 43 Ill. App. 634.

The judgment is affirmed.

Seymour v. Howard.

1. **OPTION CONTRACT—*What Is, and What Is Not.***—The following contract—"I hereby give you an option on my livery business and stable, rental as follows: All the stock as listed by me, together with every appurtenance unlisted that goes with said business, and a ten year lease of the entire premises at \$100 a month for five years first ensuing, and \$125 a month for the second period of five years, all feed to be excepted, and insurance on the stock. Price for all \$5,500; \$3,500 cash and \$2,000 in notes, maturing monthly, six per cent interest; notes to run from one to twelve, to fourteen months, all secured by mortgage on the stock, and insurance duly assigned to me. This option expires June 1st, 1890,"—was held not to be an option contract, within the meaning of Sec. 130 of the Criminal Code.

2. **OPTION CONTRACTS—*What Are.***—The distinction between an option to take or to deliver, with no corresponding obligation to deliver or take, and a proposal which may be withdrawn before acceptance, but which, not withdrawn, becomes a contract by acceptance, is recognized.

Memorandum.—In the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Special counts and plea of the general issue; trial by jury; verdict and judgment for defendant; appeal by

Seymour v. Howard.

plaintiff. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, MATZ & FISHER, ATTORNEYS.

The document being a mere offer, and not a contract, does not fall within Sec. 130 of the Criminal Code.

If the document did not amount to a contract, but was a mere proposition for one, then it was clearly not within the statute. *Schneider v. Turner*, 27 Ill. App. 220, 130 Ill. 28.

The document, though a mere offer, became a binding contract when it was accepted within the limited time, and before it was withdrawn.

While the law is well settled that the offerer who has made an offer that shall remain open for a definite time, has the right to withdraw his offer any time before acceptance, the law is equally well settled that should the offeree accept the offer before withdrawal and within the limited time, the offer ripens into a contract. *Larmon v. Jordan*, 56 Ill. 208; 1 *Parsons on Contracts*, 481; *Boston & Maine R. R. v. Bartlett*, 3 Cush. 224.

THOMAS McENERNY, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

May 8, 1890, the appellee gave to the appellant a writing as follows:

“CHICAGO, May 8, 1890.

WM. SEYMOUR:

I hereby give you an option on my livery business and stable rental as follows: All the stock as listed by me, together with every appurtenance unlisted that goes with said business, and a ten year lease of the entire premises at \$100 a month for five years first ensuing, and \$125 a month for the second period of five years, all feed to be excepted, and insurance on the stock.

“Price for all, \$5,500; \$3,500 cash and \$2,000 in notes,

maturing monthly, six per cent interest; notes to run from one to twelve to fourteen months, all secured by mortgage on the stock, and insurance duly assigned to me.

This option expires June 1, 1890.

J. H. HOWARD."

With it was a list.

There was evidence that before June 1, 1890, this proposal to sell not having been withdrawn, Seymour accepted it, and was ready, able, willing, and offered to complete the purchase, but Howard refused, and this suit was brought by Seymour to recover damages for the loss of his bargain.

The question made by the parties is whether the doctrine of *Schneider v. Turner*, 27 Ill. App. 220, and cases following it, cited in *Kerting v. Hilton*, No. 4980, applies to this case; and to that question we have no hesitation to answer, no.

In *Hibbard v. Summers*, 50 Ill. App. 381, the familiar law that a proposal on one side, accepted by the other according to its terms, constitutes a contract, was so familiar that neither counsel nor court thought of alluding to it. In *Schneider v. Turner*, both in this court and in the Supreme Court, 130 Ill. 28, the distinction between an option to take or deliver with no corresponding obligation to deliver or take, and a proposal which may be withdrawn before acceptance, but which, unwithdrawn, becomes a contract by acceptance, is recognized. The law which is applicable to the writing here, is laid down in *Larmon v. Jordan*, 56 Ill. 204, at page 208.

The word "option" did not change the legal effect of the instrument as shown by the whole body of it.

No consideration is necessary for a proposal. It is the beginning of negotiations, which, if ending in a bargain, will then usually be supported by a consideration.

Nor was the appellee concerned in whatever arrangements the appellant made with other people by which it became his interest to accept the proposal.

The decision that the statute makes this writing void was wrong. Reversed and remanded.

Giffert v. McGuern.

Giffert v. McGuern, Executrix, etc.

1. **WITNESS—Husband Not Competent—When.**—A husband is not a competent witness for his wife as to transactions with a testator when the opposite party sues or defends as executor.

2. **DAMAGES—Excessive.**—The question of excessive damages must be specially brought to the attention of the court below, or it can not be reviewed in the Appellate Court.

Memorandum.—Assumpsit. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 8, 1894.

The statement of facts is contained in the opinion of the court.

SYLVESTER G. ABBOTT, attorney for appellant.

CYRUS J. WOOD, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee, who is the executrix of the last will, etc., of her deceased husband, John D. McGuern, sued before a justice of the peace the appellant, and her husband, William Giffert, for attorney fees in a chancery suit in which the appellant and her husband were complainants, though the latter was improperly joined, as it was a suit to clear the title of her real property. That the deceased was their solicitor, retained by them both, there is evidence tending to prove. William Giffert was not served, and judgment was obtained before the justice against the appellant only, and she appealed to the Superior Court. There the case was tried by the court, and the only question of law now is whether William Giffert was rightly rejected as a witness on behalf of his wife, when offered by her to testify to conversations with the deceased.

In *Treleaven v. Dixon*, 119 Ill. 548, it is held that a husband is not a competent witness for his wife as to transac-

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tions with the testator when the opposite party sues or defends as executor. That decision is followed in *Way v. Hariman*, 126 Ill. 132. We may not review the reasons for the decisions.

The services of the deceased were proved to be worth from \$150 to \$175—payment of \$25 was admitted—and the court found for the appellee \$125. Checks to the amount of \$84, one of them being \$25, which were made by William Giffert, all of which were payable to and had been indorsed by the deceased, and paid by the bank, were put in evidence, but it would seem the court only allowed as a credit the one for \$25.

The record nowhere shows whether the services of the deceased were before or after, or contemporaneous with, the giving of the checks.

The appellant did not except to the finding, and the motion for a new trial is grounded only on the rejection of William Giffert as a witness, and that "the finding of the court is contrary to the evidence." Had the finding been excepted to, such exception, on the ground assigned for a new trial, would only have raised the question whether the finding was for the right party; not whether it was too much. *Payne v. McLean*, 44 Ill. App. 354. Excess must be specially brought to the attention of the court below, or it can not be reviewed here. There is no error in the record.

Barzynski v. Stolba.

1. INSTRUCTIONS—*Must be Based upon the Evidence.*—An instruction not predicated upon the evidence in the case, or which misstates the same, is erroneous.

Memorandum.—Assumpsit. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 18, 1894.

The statement of the facts is contained in the opinion of the court.

ALEXANDER SULLIVAN and E. J. McARDLE, appellant's attorneys.

ASHCRAFT & GORDON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

If the appellee was entitled to recover, the common count for work, labor and materials, was all the count needed. Geary v. Bangs, 37 Ill. App. 301.

The appellant, the rector of St. Stanislaus Polish Roman Catholic Church, employed the appellee, an engraver, to make a thousand medals for a hundredth anniversary occasion.

The inscription contained the word "Swieca," which alone means candle, but with dots—cedillas—under e and a, the pronunciation of the word is changed from "sweitzza" to "swenzo," and the meaning is changed to "celebrate."

The medals made were without cedillas, and the question of fact is whether by neglect of the appellant in giving, or of the appellee in following, instructions.

For the appellee the court gave two instructions so much alike that one is sufficient, as follows :

"You are further instructed that if you believe from the evidence that defendant gave plaintiff an order for medals and gave him definite instructions to what should be placed upon such medals, and that plaintiff in making such medals placed thereon words, figures and pictures not embraced in the written instructions, and if you believe from the evidence that said medals were tendered to defendant, and that he made no objections to such additional words, figures and pictures, but approved of the same, and has not and does not make objections to such medals on account thereof, then the fact, if it is the fact, that such additional words, figures and pictures were placed upon said medals, would not prevent the plaintiff's recovering in this action, provided he com-

VOL. 51.] Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.

pleted said medals according to the contract and the written instructions as hereinbefore stated."

All of the evidence in the case upon either side, upon that point, is that the appellant never did approve the medals, but always, and still at the trial, objected to, and refused to accept, the medals, because of the absence of the cedillas.

There was no contest about additions, but omissions; and the instructions are not only without evidence, but confusing and misleading. Such instructions are erroneous. *Espen v. Roberts*, 33 Ill. App. 268; *Chicago v. Colman*, 33 Ill. App. 557; *St. Louis, A. & T. R. R. v. Walker*, 39 Ill. App. 388.

For that error the judgment is reversed and the cause remanded.

Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.

1. CONTRACTS—*General Rules of Construction*.—A contract is to be considered as an entirety; harmonious significance is, if possible, to be given to each of its parts; it is to be reviewed and interpreted from the standpoint occupied by the parties when it was made, and if enforced by the courts, must not be unconscionable or unreasonable.

2. CONTRACTS—*Application of the Rule*.—Where a contract provided that certain royalties on all boots and shoes made on certain machines during a calendar month were to be due on the first day of the calendar month next following, and were to be paid within one month from that day, but if said royalties due on the first day of any month should be paid on or before the fifteenth day of that month, a discount of fifty per cent from the royalties specified in a designated schedule, would be granted in consideration thereof, it was held that the fifty per cent of the schedule price was the real measure of the royalties under the contract.

3. CONTRACTS—*Rights of Contracting Parties*.—Parties have a right to make such contracts as they see fit, and courts will enforce them, but this, like most general principles, is tempered in its application by other considerations of almost equal importance.

4. CONTRACTS—*Relief from Penalties in Law Courts*.—Formerly a person who incurred the penalty of a bond was compelled to resort to a court of equity for discharge by paying the damages which the obligee had suffered; now courts of law afford this relief.

5. CONTRACTS—*Liquidated Damages*.—In respect to undertakings for

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the payment of liquidated damages for the doing or not doing of certain things, courts of law will take into consideration the intent of the parties and the reasonableness of the contract. Whenever it appears that the stipulated damages are the subject of calculation and adjustment between the parties, and a certain sum has been agreed upon and intended as compensation; and is in fact reasonable in amount, it will be allowed as liquidated damages.

6. *CONTRACTS—Stipulated Damages.*—The question presented to a court when asked to enforce the payment of stipulated damages is, is the amount reasonably compensatory, or is it a mere penalty having no relation to the injury actually suffered? If the amount stipulated violates the fundamental rule of compensation, it will be treated as a penalty, and this without reference to the name which may be given to what is obviously nothing but a penalty.

7. *CONTRACTS—Penalty for Non-Performance.*—Where a large sum is stipulated to be on the non-payment of a less sum, made payable by the same instrument, the former is *prima facie* a penalty. If the question is to be determined by construction of the instrument alone, it will be deemed a penalty.

8. *CONTRACTS—Interpretation of Doubts.*—In interpreting a contract the court, when in doubt, will presume the parties not to have meant the stipulated sum to be compensation, or in other words, will treat the sum fixed by the parties as a penalty.

9. *CONTRACTS—Unjust and Unreasonable.*—The rule that courts will enforce such contracts as parties see fit to make must at times yield to other considerations: courts do not enforce contracts opposed to public policy, or unjust and unconscionable.

Memorandum.—Assumpsit. Error to the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 22, 1894.

STATEMENT OF THE CASE.

Plaintiff in error brought in the Circuit Court an action of assumpsit to recover certain royalties alleged to be due upon a certain contract by it made with the defendant.

Paragraph three of the contract contains a schedule of rents or royalties to be paid by defendant in error for the use of the machines.

Paragraph four provides that defendant in error shall keep an account of all boots and shoes manufactured by the use of said machines, and shall render a statement thereof to plaintiff in error.

VOL. 51.] Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.

Paragraph five, being the one upon a construction of which this controversy turns, is as follows:

"The lessee agrees to pay unto the lessor, as rent for the machines hereby leased, and as royalty for the use of the patents hereby licensed, the rent or royalty specified in the schedule herein, on each pair of boots or shoes of the respective kinds mentioned or described in said schedule, made by the aid of said machines, or any of them, or by the use of the said patents or any of them, the rents and royalties for all such boots and shoes made as aforesaid during one calendar month, to be due and payable on the first day of the calendar month next following, and to be paid within one month from that day; but the lessor hereby agrees that if the rents and royalties due on the first day of any month, shall be paid on or before the fifteenth day of that month, it will, in consideration thereof, grant a discount of fifty per cent from the rents and royalties specified in the schedule aforesaid; and the lessee further agrees to pay, while it shall retain possession of the machines hereby leased, all taxes thereon, to whomsoever laid or assessed."

Upon the basis of the schedule in paragraph three, the rents and royalties for the machines in use in the Chicago factory, during the month of September, 1891, amounted to \$1,198.63, no part of which was paid until November 24, 1891, at which time defendant in error paid to plaintiff in error the sum of \$599.27, which sum is fifty per cent of the amount of the schedule. To recover the other fifty per cent of the amount of the schedule is the object of the first count in the declaration.

Special counts based upon and setting forth the substance of this contract having been filed, the defendant demurred thereto, which demurrer being sustained by the court, there was judgment thereon; to reverse such judgment this writ of error is prosecuted.

JOSEPH H. DEFREES, attorney for plaintiff in error; ALDRICH, PAYNE & DEFREES, of counsel.

Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.

BRIEF OF DEFENDANT IN ERROR, MORAN, KRAUS & MAYER,
ATTORNEYS.

Courts will not permit the parties, by express stipulation, or by any form of language, however clear the intent, to set it aside; on the familiar ground, *conventus privatorum non potest publico juri derogare*. Davis v. Freeman, 10 Mich. 188; Myer v. Hart, 40 Mich. 517.

The rule that parties to a contract can not characterize a transaction by the mere use of terms, is nowhere more fully recognized than by the courts of this State. It has been applied where a penalty has been sought to be disguised under the cloak of liquidated damages. Tiernan v. Hinman, 16 Ill. 400; Scofield v. Tompkins, 95 Ill. 190; Bryton v. Marston, 33 Ill. App. 211.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is contended by the plaintiff that the contract under consideration is to be construed as a license to use certain machines upon payment by a certain day of the full royalty mentioned in the contract, with a provision that if the sum earned in one month is paid at a fixed period before the same becomes due, then a deduction of fifty per cent shall be made therefrom; that the exaction of twice as much if payment is made on the first day of November as would be required to discharge the debt if paid on the fifteenth day of October, is not the taking or claiming of a penalty, but merely the taking of the exact royalty stipulated for.

The first question to be here considered is, what is the proper construction and meaning of this contract; that is, what did the parties intend and mean thereby.

Contracts are to be considered as an entirety; harmonious significance is, if possible, to be given to each of the parts thereof; they are to be viewed and interpreted from the standpoint occupied by the parties when they were made, and, if enforced by the courts, must not be unconscionable and unreasonable. Bishop on Contracts, Secs. 478 and 737-382, 384; Stacey v. Randall, 17 Ill. 467; James v. Morgan,

VOL. 51.] Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.

1 Lev. 111; *The Earl of Chesterfield v. Janssen*, 1 Atk. 351, 352; *Collins v. Lovelle*, 44 Vt. 230; *Esham v. Lamar*, 10 B. Monroe, 43; *Jacquith v. Hudson*, 5 Mich. 123; 1 Story's Eq. Juris., Sec. 331, note 5.

It may be fairly inferred that the parties to this contract, in making it, contemplated that at the full schedule prices stated for the use of their machines, the royalty for the month of September, 1891, would amount to over a thousand dollars.

While there is some confusion, if not contradiction, in the contract, as to when the amount earned for that month would be due, we think that the conclusion fairly to be drawn, is, that such amount was payable on the first day of the succeeding November, and that suit therefor might have been properly brought on the second day of that month, and not before.

Did, therefore, these parties intend and mean that for a prepayment on October 15th, of \$1,198.63, due November 1st, a discount of \$599.27 should be made?

It is manifest that no business man would make such a discount.

If a debtor should account for the disposition of his assets by showing that he had made to a firm in good credit, such an allowance for fifteen days prepayment, the transaction would at once be stamped as fraudulent, and if it were generally known that a mercantile house in Chicago were paying one hundred per cent for fifteen days time on bills of five hundred dollars, its credit would at once be seriously impaired.

To treat therefore, the contract as one by which it was understood and meant by the parties that the real royalty stipulated for, was the full amount named in the schedule, and not fifty per cent thereof, is to so interpret the agreement as to make it a most unreasonable instrument, and one which the natural presumptions are, that the parties did not intend to agree to.

The distinction between a discount of fifty per cent for fifteen days prepayment, and one, two or three per cent allowance for a like time, is so obvious as to need no discussion.

It is true that taking the view we do, that the true meaning of this agreement is that one-half of the amounts specified in the schedule is the real sum stipulated to be paid, and that the royalty earned for September became demandable November first, there is in the instrument no provision for a penalty. Yet, in considering the construction plaintiff urges should be placed upon this instrument, the principles governing stipulated damages, as well as agreements for unreasonable compensation, are applicable. Many years ago, when suit was brought upon a contract to pay for a horse a barley corn a nail, doubling it for each nail, and it was averred that there were thirty-two nails in his shoes, which came to 500 quarters of barley, the court directed judgment only for eight pounds, the value of the horse. *James v. Morgan, supra.*

It is insisted by the defendant that the true sum agreed to be paid is fifty per cent of the amount of the schedule, and that all in excess of this is a penalty; while the plaintiff contends that the schedule price is the sum intended and agreed, and that there is no penalty, the fifty per cent mentioned being purely a discount for prepayment.

There are few subjects upon which there have been more apparently conflicting decisions than on the subject of whether an agreement to pay or deduct a fixed sum as a compensation for prepayment, or as damages for the doing or not doing of certain things, is to be considered as liquidated damages, an agreed reward, or as a penalty. This arises from the fact that in all this class of cases there has been an attempt by courts of law to shape their rulings so as to, while enforcing a legal right, take into consideration the principles by which a court of equity would be guided in arriving at a conclusion in the same matter.

That parties have a right to make such contracts as they see fit, and that courts will enforce them, is well established; but this, like most general principles, is tempered in its application by other considerations of almost equal importance.

Formerly, he who had incurred the penalty of his bond was compelled to resort to a court of equity for relief and an opportunity to be discharged by paying all the damage

VOL. 51.] Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.

which his obligee had suffered; now courts of law afford this equitable relief. *Kemble v. Farren*, 6 Bing. 147; *Astley v. Welden*, 2 B. & P. 346.

So now, in respect to undertakings for the payment of so-called liquidated damages for the doing or not doing of certain things, courts of law will take into consideration the intent of the parties and the reasonableness of the contract, and whenever it appears that the stipulated damages were the subject of calculation and adjustment between the parties, and a certain sum was agreed upon and intended as compensation, and is in fact reasonable in amount, such sum will be allowed by the court as liquidated damages. *Union L. & E. Co. v. Erie Ry. Co.*, 37 N. J. L. 23-27; *Wakefield v. Stedman*, 12 Pick. 562; *Howes v. Axtel*, 74 Ia. 400; *Westerman v. Means*, 12 Pa. 97; *Powell v. Burroughs*, 54 Pa. 329; *Sedgwick on Damages*, Sec. 405.

Compensation is the thing which courts have constantly in mind in awarding damages. The question presented to a court when asked to enforce the payment of stipulated damages, is, first, is the amount reasonably compensatory, or is it a mere penalty, having no relation to the injury actually suffered; if the amount so stipulated is such that it violates the fundamental rule of compensation, it will be treated as a penalty, and this, without reference to the name which may be given to what is obviously nothing but a penalty. *Sedgwick on Dam.*, Sec. 407; *Scofield v. Tompkins*, 95 Ill. 190; *Bryton v. Marston*, 33 Ill. App. 211; *Mueller v. Klein*, 27 Ill. App. 473; *Tiernan v. Hinman*, 16 Ill. 400; *Bishop on Contracts*, Secs. 737 and 478; *Groves v. Groves*, 1 Wash. (Va.) App. 1; *Longworth et al. v. Asksen*, 15 Ohio St. 370.

In *Sutherland on Damages*, Vol. 1, p. 501, it is said: "Where a large sum is stipulated to be paid on the non-payment of a less sum made payable by the same instrument, the former is *prima facie* a penalty. If the question is to be determined by construction of the instrument alone, it would be deemed a penalty."

In the case of *Tiernan v. Hinman*, *supra*, the Supreme Court of this State said: "Where by the terms of a contract a greater sum of money is to be paid, upon default in

the payment of a lesser sum at a given time, both courts of law and equity will hold the provisions for the payment of the greater sum to be a penalty. And even where the parties stipulate for the payment of a sum certain on default of the performance of an agreement, such stipulation will be treated as a penalty, if the damages are not difficult of ascertainment."

Whether the damages provided for were difficult of definite ascertainment, or could be readily calculated, is a matter of importance in determining if the stipulated sum is to be deemed a penalty or a reasonable agreed compensation. Sedgwick on Damages, Sec. 413.

In interpreting the contract, the court, when in doubt, will presume the parties not to have meant the stipulated sum to be compensation, or, in other words, will treat the sum fixed by the parties as a penalty. Sed. on Dam. Sec. 408; Smith v. Penton, 6 B. & C. 216.

The damage for a delay in the payment, as well as the reasonable reward for the prepayment of money is easily ascertainable.

Counsel for plaintiff say that for the "assumption" that the real indebtedness is the lesser sum, there is no ground beyond the "seemingly" "large discount;" that this "was a matter for the parties to arrange, and if fairly done, upon sufficient consideration, the court can not change it." We assent to this statement of the power of the court, but we do not think that for what, under counsel's view of the contract is spoken of as the "seemingly large discount," there was sufficient consideration.

As before said, the rule that courts will enforce such contracts as parties see fit to make, at times yields to other considerations; courts do not enforce contracts that are opposed to public policy, nor those clearly unjust and unconscionable. Bishop on Contract, Sec. 216-473; Jacquith v. Hudson, *supra*; 2 Kent's Com., 266; Ray v. Mackin, 100 Ill. 246.

As to such agreements the rule is "*Conventis privatorum non potest publico juri derogare.*"

As before stated, the contract under consideration is somewhat uncertain. Plaintiff contends that the September

VOL. 51.] Goodyear Shoe Machinery Co. v. Selz, Schwab & Co.

royalty was payable November 1st, while the defendant insists that it became, in the language of the agreement, "due and payable on the first day of the calendar month next following," viz., October 1st. While from a consideration of the entire instrument, we are of the opinion that such royalty was not demandable until November 1st, we find that the real payment stipulated to be made was fifty per cent of the sum mentioned in the schedule, and this we think is the conclusion to which any intelligent business man would come from reading the instrument.

It is quite likely that the parties did not understand the contract alike. Plaintiff's managers may have thought that while the real sum to be paid was fifty per cent of that mentioned in the schedule, yet if that earned in one month was not paid by the fifteenth of the succeeding month, the sum earned and to be paid would be doubled.

Plaintiff contends that the true royalty, that agreed to be paid, was the full amount of the schedule. The true royalty was the sum which, under the agreement, was earned, and, consequently, to be paid.

If the entire sums written in the schedule were earned, and consequently the amount of \$1,198.63 was due, either October or November 1st, then the agreement to receive, on October 15, \$599.27 in full satisfaction thereof, was absurd and unreasonable.

Compensation is not only the thing which, in respect to damages, courts continually bear in mind, but as regards contracts, it is only the compensation earned or the damage suffered which courts will give judgment for. Can it be contended that if \$1,198.63 had been earned October 1st, and was payable November 1st, there was any adequate or reasonable consideration for an agreement to receive, on October 15, \$599.27 in full payment? Or if for September only, \$599.27 was demandable October 15th, that fifteen days thereafter that demand had increased to \$1,198.63?

If such be the terms of the agreement, the contract is one that the courts will not enforce.

We think that the Circuit Court arrived at a correct conclusion, and its judgment is affirmed.

Steinfeld v. Taylor.

Steinfeld v. Taylor.

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1. PARTIES LITIGANT—*To Sue in Their Right Names.*—By whatever name a person may contract, he may, notwithstanding, sue and be sued by his right name.

2. PROMISSORY NOTES—*Control of Indorsements.*—The payee of a promissory note, having the same in his possession, is presumed to be the owner of it and has the control over it. He may strike out indorsements upon it.

3. OBJECTIONS TO RECORD—*On Rehearing.*—Objections to the record can not be made for the first time upon a petition for rehearing.

Memorandum.—Assumpsit on promissory note. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

WEIGLEY, BULKLEY & GRAY, attorneys for appellant.

J. V. A. WEAVER, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant brought suit in his own name for a note reading as follows:

"\$690.

CHICAGO, Nov. 15, 1892.

Four months after date I promise to pay to the order of Wm. M. Taylor Mantel & Grate Co. six hundred and ninety dollars, payable at the Metropolitan National Bank, value received, with interest at 6 per cent per annum.

LOUIS E. STEINFELD."

Indorsement upon said note: "Pay to the order of the American Exchange National Bank, Chicago.

WM. M. TAYLOR MANTEL & GRATE CO.

WM. M. TAYLOR, Prop."

Amasa Jones testified that there was due for principal and interest on said note \$714.15.

The Court: Q. What relationship does William M. Taylor bear to the William M. Taylor Mantel & Grate Co., and is he interested in the business?

Witness, Amasa Jones: A. William M. Taylor is doing business under the name of William M. Taylor Mantel & Grate Co., and is the sole proprietor of said business.

There was judgment for Wm. M. Taylor from which appellant appeals.

By whatever name one may contract, he may sue and be sued by his right name.

The testimony of Amasa Jones showed to whom the note really ran. The indorsement to the American National Bank was one which the plaintiff, having the note in his possession, was at liberty to strike out; the note being payable to him and in his possession, is presumed to belong to him and he has control over it. *Brinkley v. Going, Breese*, 366; *Porter v. Cushman*, 19 Ill. 574; *Best v. Nokomis Nat. Bank*, 76 Ill. 610; *Curtis v. Martin*, 20 Ill. 557; *Daniel on Neg. Instruments*, Vol. 456, 638, 662.

The judgment of the Circuit Court is affirmed.

MR. JUSTICE GARY ON PETITION FOR REHEARING.

October 18, 1893, the appellant filed his abstract and brief. November 14, 1893, the appellant and appellee stipulated for twenty days time to file additional record. November 28, 1893, the appellee filed the additional record. December 5, 1894, appellee filed an abstract of that record and his briefs. December 13, 1893, the case was taken on the call on the briefs, with nothing to call the attention of the court that any objection could be made to any part of the record.

On this petition, for the first time, the objection is made that the additional record is by an unwarranted amendment of the bill of exceptions. That objection comes too late. *Booth v. Koehler*, 51 Ill. App. 370, applies in principle. Petition denied.

Samuel B. Foster v. Edwin Wynn.

1. **BROKERS—When Entitled to Commission.**—A real estate broker, before he is entitled to commissions, must furnish a purchaser who is ready, willing and able to complete the purchase on the terms proposed. If the vendor accepts the purchaser and enters into a valid contract with him or cancels the contract and releases the purchaser, the commission is earned.

Memorandum.—Assumpsit for broker's commissions. Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 13, 1894.

STATEMENT OF THE CASE.

In December, 1889, appellant asked appellee, a real estate broker, to sell for him a lot on Ashland boulevard, in the city of Chicago. Appellee submitted the property to Henry W. Caldwell, who offered \$225 a foot, and agreed to assume two boulevard assessments. Appellee then communicated the proposition to Foster, the appellant, who accepted it, whereupon a written contract in the usual form was signed by the parties, Caldwell and Foster, and delivered to appellee together with \$250 earnest money, to be held in escrow. An abstract of title was also furnished by Foster and given by appellee to Mr. Caldwell's attorney to examine. Objections were raised to the title, and as a result of various consultations in reference to the defects, the contract was canceled and the deal declared off. Appellee was not present when the contract was canceled; never urged or consented to it, and took no part in the conversations regarding the title. The purchaser was ready and willing and able to perform his contract, and never refused to do so. Appellee claimed the commissions after negotiations were declared off, which Foster refused to pay. Suit was brought to recover the commission, jury waived, and the cause being submitted to the court, judgment was entered against Foster for \$140.60. From that judgment Foster appeals to this court.

SAMUEL B. FOSTER, attorney for appellant.

PENCE & CARPENTER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action by an agent to recover commissions on a sale of real estate.

Appellee being employed by appellant sold the latter's property to one Caldwell. The contract was brought to, approved, and, it would seem, signed by him.

Caldwell afterward made objection to the title—objection said by appellant to have been frivolous. It is quite evident that Caldwell did wish to be released from his contract, and appellant, without consultation with appellee, released him. Caldwell was evidently able to perform his bargain, and, quite likely would have done so had not appellant released him.

If Caldwell had without release from, or fault of appellant, refused to complete the purchase, a different question as to the right to commissions would have been presented. Blankenship v. Ryerson, 50 Ala. 426; Gilchrist v. Clarke, 8 S. W. Rep. 572.

Caldwell could not, by his statement when he was released from his bargain, that "no commissions would be charged," bind appellee, who had nothing to do with and was not present when the release was given.

By the unconditional release of Caldwell the money he had deposited was released from any claim thereon appellant had before then had. Appellant at once ordered appellee to surrender the earnest money to Caldwell.

The disputed and disputable questions of fact must be, by this court, presumed to have been found in favor of appellee.

The jury have failed to find that appellee was guilty of any improper conduct, and they have found that he was authorized to and did make a sale of appellant's property to one able, willing and ready to buy; the judgment must therefore be affirmed. Carter v. Webster, 79 Ill. 435; McCaughy v. Mahannah, 28 Ill. App. 169; Adams v. Decker, 34 Ill. App. 17.

Schillo v. Anderson.

51 403
87 306

Schillo v. Anderson.

1. **APPEAL—Interlocutory Order—Injunction.**—Sec. 24, Ch. 69, R. S., permits an appeal from an order granting an injunction only when such appeal is taken within thirty days from the entry of such order, and is perfected in said Appellate Court within sixty days from the entry of such order or decree.

Memorandum.—Appeal from an interlocutory order, etc., entered by the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1893, and appeal dismissed. Opinion filed November 9, 1893.

The statement of facts is contained in the opinion of the court.

ARNOLD TRIPP, attorney for appellant.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of injunction. The statute permits an appeal from such an order only "when such appeal is taken within thirty days from the entry of such interlocutory order or decree, and is perfected in said Appellate Court within sixty days from the entry of such order or decree." Chap. 69, Rev. Stat., Sec. 24.

The order of injunction was on July 17, 1893. The transcript of the record of the Circuit Court was not filed here until September 25, 1893, which was more than sixty days from the date of the order.

The objection goes to the jurisdiction of this court, and must be raised by this court. An appeal is not perfected in this court until the transcript is filed here.

The appeal must be dismissed.

51 404
157* 361

Illinois Central R. B. Co. v. Gilbert.

1. INSTRUCTIONS—*Error, Cured by Remittitur.*—An error in an instruction may in some cases be cured by a remittitur. So where an instruction informed the jury that they should not find, etc., exceeding the amount named in the *ad damnum*, and the jury having returned a verdict for the full amount of the *ad damnum*, the error was cured by a remittitur of one half of the amount.

2. MEASURE OF DAMAGES—*In Case of Death from Negligent Act.*—The jury may assess such damages as will be a just and fair compensation for the pecuniary loss suffered by the next of kin from the death of the deceased, and in so doing they may take into consideration every reasonable expectation the survivors may have had of pecuniary benefit or advantage from the continuance of his life.

Memorandum.—Action for damages. Death from negligent act. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

C. V. GWIN, attorney for appellant; JAMES FENTRESS, of counsel.

WALKER & EDDY, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Charles F. Gilbert was employed by appellant to work at its repair shops at 27th street, Chicago. It was his duty to obey the orders of the foreman at that place. Upon the day he was killed, he was engaged in rolling car wheels across the six tracks of the company at that point. A severe storm was blowing from the northwest, the snow flying so thick that one could see but a little ways, such a morning that one instinctively, if not necessarily, turns his face away from the storm, to avoid being blinded by it. The deceased had assisted in rolling car wheels across the

tracks which ran north and south, and when returning to the shop, walking in a southeasterly direction, was struck by an engine, backing toward the south. From 150 to 200 men were engaged that morning in rolling wheels across the tracks. Trains passed over these tracks at frequent intervals.

The train which struck the deceased was pulling seven or eight cars, and going at about nine miles per hour. It pushed him along for some sixty feet before it passed over him, and then went about twenty feet before it stopped.

There was evidence tending to show that the bell of the engine was rung ere the deceased was hurt, and while there was evidence tending to show that no such warning signal was given, the preponderance of the evidence seems to indicate that the bell was so rung. It substantially appeared that no lookout was stationed to keep watch of approaching engines, that the engine which ran over the deceased was an old one, having no brake, and was stopped by reversing; that the danger to the deceased was perceived by appellant's foreman and others, who hallooed as loud as they could, but failed to attract the attention of the deceased; that no one on the engine saw the deceased until after he had been run over, and that the foreman upon that morning warned all the men to look out for passing trains.

The jury returned a verdict of \$5,000 for the plaintiff; upon the suggestion of the court, \$2,500 was remitted from this, and judgment was entered for the remainder.

The deceased was seventeen years old, and earning \$1.30 per day. He left, surviving him, his father and mother, three sisters and one brother.

We think that the jury were warranted in finding appellant guilty of negligence.

It knew that 150 of its employes were engaged in work requiring them to cross these tracks; that there blew from the northwest a blinding snowstorm; that trains passed this point at frequent intervals. Something more than the usual warning given by an approaching engine was due to these men on this occasion.

The danger of that morning was not one of the ordinary perils incident to the employment of deceased. The danger was extraordinary, unusual, and the care required of appellant was such as the circumstances demanded.

What constitutes negligence depends almost altogether upon the circumstances of the occasion. Nor do we think it can be conclusively said that the deceased failed to exercise ordinary care. It is very difficult to say what ordinary care upon so extraordinary an occasion would be.

It is urged that the court erred in giving the following instruction:

"If you find from the evidence that the defendant is guilty of the negligence charged in the plaintiff's declaration, and that the same resulted in the death of Charles F. Gilbert, then the plaintiff is entitled to recover in this action for the benefit of the next of kin of said deceased, such damages as the jury may deem from the evidence and proves a fair and just compensation for whatever pecuniary damage, if any, the evidence shows said next of kin have sustained by reason of said death, not exceeding \$5,000."

Such an instruction, omitting the words "five thousand dollars," was approved in *C. & St. P. R. R. Co. v. Dowd*, 115 Ill. 659, and an instruction in substantially the words of the one given in this case was approved in *C. & Q. R. R. Co. v. Payne*, 59 Ill. 534.

The concluding words, "not exceeding five thousand dollars," have been disapproved by this and the Supreme Court, among other cases, in *C. & P. R. R. Co. v. Austin*, Admx., 69 Ill. 426, and *Village of Warren v. Wright*, 3 Brad. 602.

The error in this regard was cured by the remittitur from the verdict of \$2,500.

If, in estimating the plaintiff's damages, only the wages the deceased would, at the rate he was being paid, have earned prior to his becoming twenty-one years of age, deducting therefrom the cost of his board and clothes, was to be considered, the judgment would be far too large a sum.

This court in *Andrews v. Boidecker*, 17 Brad. 213, a case

Dunderdale v. Westinghouse Electric Co.

similar to this, said: "The jury may assess such damages as will be a just and fair compensation for the pecuniary loss suffered by the next of kin, from the death of the deceased, and in so doing they may take into consideration every reasonable expectation the survivors may have had of pecuniary benefit or advantage from the continuance of his life." See also *Andrews v. Boidecker*, 27 Ill. App. 30.

It has been repeatedly held that the jury may make their estimate of the pecuniary loss sustained from the facts proved, connecting them with their own experience and knowledge. *C. & A. R. R. Co. v. Shannon*, Admr., 43 Ill. 338; *The City of Chicago v. Mayor*, 18 Ill. 349.

We do not think that, under the rule existing in this State for estimating damages in such a case as this, the amount awarded can be here said to be excessive, and we regard the verdict of guilty as one which the jury were warranted by the evidence in arriving at.

We find no error requiring a reversal of the judgment in this case, and it is affirmed.

MR. JUSTICE GARY.

I can concur in the result in this case only upon the ground that if the works of a railway are so arranged as that young employes, hardly more than boys, inexperienced and by nature somewhat heedless, are exposed to great and unnecessary peril of limb and life, there is, in the comparison of negligence or carelessness, a very great preponderance against the railway when injury happens.

Dunderdale v. The Westinghouse Electric, etc., Co.

1. EXECUTION--*Return No Property Found*--*Creditor's Bills and Garnishee Process*.--The statute relative to the filing of creditors' bills and that concerning the issue of garnishee process upon the return of an execution "No property found," are so similar that the rule as to the return of execution in one case is to be applied to the other.

51	407
63	315
51	407
71	607
51	407
80	283

2. GARNISHEE PROCEEDINGS—*Execution Returned by Order of Plaintiff*.—The return of an execution by order of the plaintiff's attorney, unsatisfied, will not sustain garnishee proceedings.

3. GARNISHEE PROCEEDINGS—*Duty of Garnishee to See That Proceedings are Regular*.—It is the business of the garnishee to see that the proceedings are such that a judgment against him will be binding upon his creditor.

Memorandum.—Garnishment. Appeal from an order quashing a writ entered by the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, F. J. GRIFFEN, ATTORNEY.

The statutory return of the sheriff "No property found" on *feri facias*, even though by direction of plaintiff's attorneys, is sufficient to base garnishment proceeding upon. Starr & Curtis, Chap. 62, Sec. 1.

APPELLEE'S BRIEF, WEIGLEY, BULKLEY & GRAY, ATTORNEYS.

The writ was properly quashed for want of jurisdiction. Chanute v. Martin, 25 Ill. 63; Mich. Cen. Ry. Co. v. Koehane, 31 Ill. 144.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a proceeding by way of garnishment, based upon a judgment against appellant, on which an execution was issued, and on the same day was, by order of the attorney of the plaintiff indorsed thereon, returned "no property found and no part satisfied."

We regard the statute relative to the filing of creditors' bills and that concerning the issue of garnishee process upon the return of an execution "No property found," as so similar that the rule as to the return of execution in one case is to be applied to the other.

We have already held that the return of an execution, by

Kerfoot v. The People.

order of plaintiff's attorney, unsatisfied, will not authorize the filing of a creditor's bill. *Scheubert v. Honel*, 50 Ill. App. 597.

Following the principle of that case we can not sustain the garnishee proceeding instituted in this case, based as it was upon a return made in obedience to an order of the attorney of the plaintiff in the execution.

In *Chanute et al. v. Martin*, 25 Ill. 63, the court, in speaking of a garnishee proceeding based upon a return of "No property found," said: "It was only intended to be allowed when there is no property subject to execution or when it can not be found by reasonable efforts of the officer and the plaintiff in execution."

In *Mich. Central R. R. Co., Garnishee, v. Keohane*, 31 Ill. 144, a return of an execution after demand made, "No part satisfied, by order of plaintiff's attorney," with the statutory affidavit, was held insufficient to warrant the issue of garnishee process.

In the present case it does not appear that any demand was ever made of the execution debtor or any effort had to find property.

It was immaterial whether the attention of the court was called to the nature of the return of the execution by motion or by an answer. It is the business of the garnishee to see that the proceedings are such that a judgment against him will be binding upon his creditor. *Pierce v. Wade*, 19 Brad. 185; *Dennison v. Blumenthal*, 37 Ill. App. 385.

The order of the Superior Court quashing the garnishee writ and discharging the garnishee is affirmed.

**Kerfoot, Hutchinson, Gage, McNally, Henrotin, Davis,
and Lawson v. The People, etc., ex rel. Clingman.**

1. *INJUNCTION—Obstruction of Public Right—Special Injury.*—It is only where an obstruction of a public right is such that a special injury has been done, that an individual can maintain an action for a violation of such right. In such case the special injury is the gist of the action.

51	409
51	448
51	409
58	248
58	450
51	409
182	586

2. *INJUNCTIONS—Public Injury.*—Bills to restrain the doing of that which is merely a public injury and in respect to which the complainant has suffered no wrong or injury not common to the community, must be brought by the attorney-general as the representative of the public.

2. *INJUNCTIONS—Must be Respected.*—An injunction, however erroneously issued, must be respected; the fact that it has been granted erroneously, affords no justification or excuse for its violation.

4. *COURT OF CHANCERY—Jurisdiction—How Obtained.*—A court of chancery can obtain jurisdiction only by the filing of written pleadings, and the extent of the jurisdiction is determined by the contents of the pleadings.

5. *INJUNCTIONS—Issued Without Jurisdiction.*—A person can not be punished for disobeying an injunction which the court allowing it had no jurisdiction to issue.

Memorandum.—Injunction. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1893, and reversed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

WALKER & EDDY, attorneys for appellants.

DAVID FALES, attorney for Victor F. Lawson.

SIDNEY SMITH, attorney for Geo. R. Davis.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In most respects the questions presented by each of the cases are the same.

The bill under which the orders appealed from were made was filed by Charles W. Clingman as a citizen, resident and taxpayer, of the county of Cook, in the State of Illinois, and a stockholder of the World's Columbian Exposition. It charges that on Sunday, May 7, 1893, "complainant presented himself at the gates of the exposition and presented an admission ticket, and was refused admission; that the South Park Commissioners and said World's Columbian Exposition Company by its directors, have agreed to close the whole or part of the said land the first day of the week, commonly called Sunday, and prevent the admission

Kerfoot v. The People.

and recreation to the public of said lands and premises; wherefore complainant charges that said action is a great prejudice to him as a stockholder and to other stockholders.

Complainant refers to the act of the legislature of Illinois, providing for the location and maintenance of a park for the towns of South Chicago, Hyde Park and Lake, approved February 24, 1869, and avers that the South Park Commissioners, by the terms of the original act, hold the title to said premises as a public park, for the recreation, health and benefit of the public, and free to all persons forever, subject to such rules and regulations as from time to time shall be adopted by such commissioners.

The bill sets forth that complainant is informed that the South Park Commissioners have attempted to make a pretended lease of said property to said World's Columbian Exposition, a corporation, and charges that neither the park commissioners nor the exposition company have any right or authority to make any rule or regulation contrary to the original act, under and by virtue of which the people purchased and became possessed of said premises, and that the legislature has no power or right to change or modify the right of the people to use and occupy said premises for health and recreation forever.

The bill further charges that the directors of said exposition, pretending to be guided by an act of Congress, have decided to open a part of the premises in question, and to close a part, that is to say, certain buildings which contain exhibits of great interest to the people and of great benefit to stockholders of the exposition. And complainant charges that the act of Congress, providing for the closing of the fair is wholly unconstitutional and void. The bill sets forth Art. 8, Sec. 3, of the Constitution of the State of Illinois, providing for freedom of religious worship and convictions, and charges that the act of Congress conflicts therewith.

The bill further charges that as a taxpayer and citizen, complainant has contributed, by way of taxes, large sums of money toward the establishment and maintenance of said World's Columbian Exposition, and that it is impossible for

himself and others interested to attend said exposition except on Sunday, except at great loss and damage to themselves; and the bill concludes as follows :

“ Forasmuch, therefore, as your orators are without relief, save in a court of equity, and to the end that the said World’s Columbian Exposition, 1893, a corporation, etc., H. N. Higinbotham, President, the Board of Directors of the said corporation and the Board of South Park Commissioners, who are made parties defendant to this bill, may be required to make answer to the same, but not under oath, the answer under oath being hereby expressly waived, your orators further pray that a temporary injunction be granted unto your orators, restraining the said defendant, their attorneys, agents, employes or servants, from closing up the said South Park, now temporarily used by the said World’s Columbian Exposition, 1893, or refusing to give access to the same, or any part thereof, to any person on said first day of the week, commonly called Sunday, and that upon a final hearing hereof that the said temporary injunction may be made permanent, and your orators pray for such other and further relief in the premises as equity may require, and to your honors shall seem meet.”

Thereupon an injunction was issued, the mandatory part of the order being as follows :

“ We, therefore, in consideration thereof, and of the particular matters in said bill set forth, do strictly command you, the said above named defendant, the World’s Columbian Exposition and the persons before mentioned, and each and every of you, that you do absolutely desist and refrain from closing up the South Park now temporarily used by the World’s Columbian Exposition, 1893, or refusing to give access to the same, or any part thereof, to any person on the first day of the week, commonly called Sunday, until this honorable court, in chancery sitting, shall make other order to the contrary. Hereof fail not, under penalty of what the law directs.”

About a month thereafter, at the instance of the complainant, upon affidavits filed by him, a rule to show cause

Kerfoot v. The People.

why they should not be attached for contempt for violating the injunction was issued, directed to appellants and others.

Appellants each answered, disclaiming that in anything they had done they had any intention to violate the order of court, and set forth, *inter alia*, that they had not since the issuance of the injunction, ordered the gates closed on Sunday, but an order directing them to be open on that day had been rescinded.

The complainant, Clingman, filed a special replication to these answers, which replication appellants asked to have stricken from the files; this motion the court denied.

The court, upon the several answers and complainant's reply thereto, affidavits in support of the rule, proofs and evidence submitted by the parties and as recited in the orders imposing penalties, from the admission in open court of the counsel for the respective parties, found appellants had violated said injunction and were guilty of contempt, and imposed a fine of \$1,000 upon each of appellants Wm. D. Kerfoot, Charles L. Hutchinson, Lyman J. Gage, Andrew McNally and Charles Henrotin; a fine of \$250 upon appellant George R. Davis, and a fine of \$100 upon appellant Victor F. Lawson.

The bill shows no injury, present or prospective, to the complainant as a taxpayer; it is not alleged that anything is about to be done by which the rights of complainant as a taxpayer will be affected, nor does the bill present any grievance suffered or threatened by complainant as a stockholder in the World's Columbian Exposition.

It is not shown that the exposition stockholders have any right of entrance to the South Park or the exposition grounds on Sunday, or will be injured if the grounds be closed upon that day.

Nothing appears in the bill to show that the complainant, as a citizen and resident of Cook county, has any interest or right in the premises, or will suffer any injury from the threatened closing of the gates on Sunday, not common to each of the public. It is only where an obstruction of a public right is such that a special injury to one or more per-

sons has been done, that individuals may maintain actions for violation of such right, and in such case the special injury is the gist of the action.

If the complainant could maintain this bill, then each one of the millions who compose the public could maintain similar bills, and not only might the defendants be vexed with innumerable suits, but an adjudication in one case would not conclude the complainant in another. Nor could the defendants set up a successful defense they had made to the suit of A, as a bar to the similar suit of B.

In the case at bar, one Charles Howard, filed an intervening petition asking that the directors of the exposition company be enjoined from opening the gates on Sunday.

It is manifest that neither the complainant nor the intervenor, Charles Howard, could by any suit by them or either of them instituted, conclude the rights of the public, because neither did or could represent the public; and by no possibility could a final decree in a suit instituted by Clingman or Howard have concluded the rights of any person, save those parties to the suit.

If the complainant had succeeded in obtaining a decree that the gates should be kept open, such decree would not have prevented Charles Howard from, in another proceeding, securing a decree that the gates be closed; each decree would, however broad its language, have been in its effect conclusive and determinate, only in respect to the rights of the parties thereto, viz.; in one case the right of Charles Clingman to have the gates open for him to enter on Sunday, and in the other the right of Charles Howard to have the gates closed for him on the same day.

For these and other reasons it has been frequently held that bills to restrain the doing of that which is merely a public injury and in respect to which the complainant suffers no wrong or injury not common to the community, must be brought by the attorney-general as the representative of the public. *Davis v. Mayer*, 2 Duer, 663; *Winterbottom v. Lord Derby*, Law Rep. 2 Ex. 4316; *Hartshorn v. South Reading*, 3 Allen, 501; *McDonald v. English*, 85 Ill.

Kerfoot v. The People.

232; Wood on Nuisances, Sec. 329; High on Injunctions, Sec. 762; Pomeroy's Eq., Sec. 1379; City of East St. Louis v. O'Flinn, 119 Ill. 200.

This subject was fully considered in *City of Chicago v. Union Building Association*, 102 Ill. 379, a case in which the right of the city of Chicago to vacate and allow to be closed up a portion of La Salle street, was considered, and the court there said, "In no case has it ever been held that a private individual may maintain a bill to enjoin a breach of public trust (in the absence of statutory authority) without showing that he will be specially injured thereby."

The Superior Court having assumed jurisdiction as it ought not, and issued an injunction, the question here presented is not as to the scope or right of ultimate recovery by the complainant, but as to the force of the injunction issued in complainant's suit.

An injunction, however erroneously issued, must be respected; the fact that it has been granted erroneously, affords no justification or excuse for its violation. High on Injunctions, Sec. 1416.

We have not to consider whether the court acted erroneously, but whether it had, by the 'filing of complainant's bill, authority to proceed in respect to the subject-matter of such bill and could render a valid and binding decree therein.

A court of chancery can not obtain jurisdiction save by the filing of written pleadings, and the extent of the jurisdiction of the court in the case under consideration is determined by the contents of the pleadings. The complainant in this case had a right to file a bill making the exposition company, its officers and directors, as well as other persons, parties defendant thereto; there are many things concerning which he might properly have called upon the court to afford him relief against those whom he made defendants to his suit; but the particular matter, which was not merely the gravamen, but the only subject of his bill, was one which he had no right to move the court to action upon, and one it had no authority, at his complaint alone, to adjudicate.

His bill shows in no respect whatever, any grievance by him suffered, or any right threatened or denied not common to the public; his bill was an assumption, an undertaking to bind the public, to conclude the multitude without giving them an opportunity to be heard. To accomplish what he, by his bill, undertook, he had no standing in court, and the court had no power at his instance to do what he asked. All the action of the court, had at his instance, other than that of patiently hearing and attentively considering what he had to urge, was without jurisdiction and binding upon no one. *Dickey et al. v. Reed et al.*, 78 Ill. 261; *Windsor v. McVeigh*, 93 U. S. 274; *Elliott v. Piersol*, 1 Pet. 328; *U. S. v. Arrendo et al.*, 6 Peters, 691; *Munday v. Vail*, 34 N. J. Law, 418; *People ex rel. T. Weed v. Liscomb*, 60 N. Y. 559-568; *Ex parte Lange*, 18 Wallace, 163; *Pomeroy's Eq. Juris.*, Sec. 129.

After the injunction was issued and served, the bill was amended by granting the attorney-general leave to appear as a complainant therein. None of appellants were by name, or other than as directors of the World's Columbian Exposition, made parties to the bill. The summons issued was not to either of appellants, but to the "Board of Directors of said corporation." It does not appear that any of appellants had notice or knowledge of this amendment. The exposition company as a defendant, would be bound to take notice of all proceedings had in the suit against it, but it can hardly be said that each one of the board of directors was as an individual chargeable with notice of whatever was done in that suit. The amendment was of the most important character; it changed the bill from one which gave the court no jurisdiction to one in which a decree binding upon the public might have been rendered. The amendment was made without reference by order or otherwise to the injunction previously issued; no injunction was asked for by the attorney-general, and no continuance of the injunction awarded ere he became a party was had. It has sometimes been held that the amendment of a bill by adding a co-complainant terminates an injunction previously issued. Attor-

Bishop v. American Preservers Co.

ney-general v. Marsh, 18 Sim. 575. In the present case the injunction order acquired no new force or efficacy by reason of the amendment. The injunction was not at the suit or instance of the attorney-general; it was a thing with which he had no connection, its violation was not a thing of which he could or did complain, because it was a thing not awarded to him, or in any suit to which, when given, he was a party. The injunction being one which the court had no jurisdiction to issue, appellants can not be punished for disregarding it. *Dickey et al. v. Reed et al, supra*; *Weigley et al. v. The People*, 51 Ill. App. 51.

We do not deem it necessary to comment on the proceedings upon the alleged contempt, other than to say that we do not think that the practice that should be followed in cases of civil contempt was pursued. The order of the Superior Court appealed from, imposing fines, will be reversed. There are certain defenses peculiar to the case of Victor F. Lawson and certain presented in the case of George R. Davis not found in any of the other appeals. We do not deem it necessary to notice these, as upon consideration of what has been stated, each and all of the respective orders imposing fines are reversed.

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Bishop v. American Preservers Co.

1. FOREIGN CORPORATIONS—*Trusts—Right to Sue for its Property.*—A foreign corporation, although abusing the privilege which it enjoys of doing business in this State, is not to be considered as an outlaw, having no right to sue for the property it owns.

2. FOREIGN CORPORATIONS—*Collateral Attack.*—The organization of a foreign corporation can not be attacked collaterally for the supposed violation of the law in regard to trusts.

3. TRUSTS.—*Purchase of Property.*—The purchase of property by a foreign corporation in pursuance of a plan of monopoly does not prevent the title passing under a bill of sale, nor can it be avoided for any supposed failure of consideration.

4. REPLEVIN—*Affidavit.*—Whether an affidavit upon which a writ of replevin is issued covers all the goods taken or is in any particular de-

fective is of no consequence after the parties have pleaded to the declaration which covers all the goods in question.

Memorandum.—Replevin. In the Circuit Court of Cook County; the Hon. SAMUEL P. MCCONNELL, Judge, presiding. Declarations for goods wrongfully taken and wrongfully detained, with a count in trover; pleas, general issue, *non detinet*, property in defendant, and that the plaintiff is a trust in restraint of trade and can not bring suit to carry out the purposes of such trust; verdict for plaintiff; appeal by defendant. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, LYNDEN EVANS AND FREDERICK ARND,
ATTORNEYS.

If the appellee urges the doctrine of *par delictum*, still it can not recover, because it was not, at the time the suit was instituted, in possession of the property (the subject-matter of the illegal contract) sought to be herein replevied. Wells on Replevin, 77; Hall v. White, 106 Mass. 399; Richardson v. Reed, 4 Gray, 441; Story on Agency, 195-344; Samuels v. Oliver, 130 Ill. 73.

The affidavit in replevin being jurisdictional, the defendant could not waive it. Leigh v. Mason, 1 Scam. 249; Fleishman v. Walker, 91 Ill. 518.

APPELLEE'S BRIEF, MORAN, KRAUS & MAYER and A. LEO
WEIL, ATTORNEYS.

The appellant, having in his possession goods of appellee as its agent or bailee, part of which goods appellee delivered to said agent from other factories, part of which appellee acquired by bill of sale from appellant, and which appellee, after said purchase, delivered to appellant, as its agent, part of which were the accretions naturally arising from the conduct of an active manufacturing enterprise, and all of said goods in appellant's possession as bailee he sought to retain, and this action is for a breach of his promise as such bailee to return or account to his principal, the appellee, for said goods, or

Bishop v. American Preservers Co.

any part thereof. *Planters Bank v. Union Bank*, 16 Wall. 483; *Armstrong v. Toler*, 11 Wheat. 258; *Holt v. Barton*, 42 Miss. R. 711; *W. U. Tel. Co. v. St. J. & W. R. R. Co.*, 3 Fed. Rep. 430; *Logan v. Grosscup*, 99 Am. Dec. 61, note; *W. U. Tel. Co. v. U. P. R. R. Co.*, 1 McCrary, 558; S. C., 3 Fed. Rep. 423; *Brooks v. Martin*, 2 Wall. 70; *Wann v. Kelly*, 5 Fed. Rep. 584; *Black v. McNiel*, 46 Ala. 288; *Anderson v. Moncrief*, 3 Dess. Eq. 124; *Hickman v. Schwartz*, 50 Wis. 270; *De Leon v. Trevino*, 49 Tex. 88; *Morawetz on Corp.*, Sec. 758; *Importing & Ex. Co. v. Locke*, 50 Ala. 334; *Greenhood on Public Policy*, Rule 27; *National Distilling Co. v. Cream City Importing Co.*, 56 N. W. Rep. 864.

An agent or bailee who has received property of his principal can not defend against an action by the principal to recover the property, on the ground that such property was acquired through an illegal transaction, nor can such agent or bailee claim adversely to his principal or set up a title adverse to his principal. *Mechem on Agency*, Secs. 525, 526; *Simpson v. Wren*, 50 Ill. 222; *Snell v. Pells*, 113 Ill. 145; *Holt v. Barton*, 42 Miss. 711; *Norton v. Blinn*, 39 Ohio St. 145; *Greenhood on Public Policy*, Rules 32, 34, 108, 109 and 110.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In July, 1888, the appellant, who was engaged in the manufacture of fruit butters, jellies, preserves and like products, by a bill of sale under seal, conveyed all his stock in trade, fixtures, etc., business and good will of the same, to the appellee, and thereafter for nearly three years continued to carry on the business as before, but on a salary from, and as agent for, the appellee.

In March, 1891, he threw off his allegiance and rebelled, and the appellee replevied what was then on hand.

Many questions are made in the case, but the one of paramount importance is that the appellant claims, and on the trial endeavored to prove, that the appellee was and is one of several corporations under the control of one body of individuals, organized and managed effectively to create and

perpetuate a monopoly in the trade, and prevent competition in prices, of the goods in which they dealt.

The appellee is a separate, independent legal entity. If it is abusing the privilege it enjoys of doing business in this State, though a foreign corporation, some remedy probably can be found to prevent future, if not punish past abuse; but it is not an outlaw, having no right to sue for the property it owns. *Morawetz, Corp.*, Sec. 758; *U. S. Vinegar Co. v. Schlegel*, 67 Hun, 356; S. C., 22 N. Y., Supplement, 407.

Its organization can not be attacked collaterally for supposed sinfulness in its conduct.

That the purchase in 1888 was in pursuance of the plan of monopoly did not prevent title passing under the bill of sale. *Greenhood on Public Policy*, 48.

Nor can it be avoided for any supposed insufficiency or failure of consideration. *Bishop on Contracts*, Sec. 124.

Questions presented by the appellants as to admission or rejection of evidence become unimportant, holding as we do that the matter to be proved was immaterial.

Whether the affidavit upon which the writ was issued covered all the goods taken, or was in any particular defective, was of no consequence after the parties had gone to issues upon the declaration, which did cover all. *Frink v. Flanagan*, 1 Gil. 35.

The replevin was of goods in the possession of the appellant as agent of the appellee; to what extent, if any, they were the same as conveyed by the bill of sale does not appear.

The judgment is affirmed.

West Chicago Street R. R. Co. v. Binder, Adm'r, etc.

1. CARRIERS OF PASSENGERS—*Duty to Persons not Passengers.*—Stringent as are the obligations of passenger carriers toward passengers, their obligation toward the residue of mankind rests merely upon grounds of general humanity and respect for the rights of others, and requires them to so perform the transportation service as not, wantonly

West Chicago St. R. R. Co. v. Binder.

or carelessly, to be an aggressor toward third persons, whether such persons be on or off the vehicle.

2. CARRIERS OF PASSENGERS—*Duty of Third Persons—Illustration.*⁹—A boy twelve years of age hurried out of a fruit store, and held up his hand as a signal for a cable car, with a trailer, then at the corner, to stop. The gripman did not see the boy, the car slackened speed at the corner but not stopping, resumed its course. The boy ran toward the car, and caught the rear platform of the grip. To what extent he got upon the step or got hold of any support, is in doubt, but at that instant there was a sudden acceleration of the speed, and the boy fell, was run over and killed by the wheels of the trailer. *It was held*, that his administrator could not recover.

3. CARRIERS OF PASSENGERS—*Negligence.*—There can be no negligence without the failure to observe some duty.

Memorandum.—Action for negligence. In the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed January 11, 1894.

APPELLANT'S BRIEF, EGBERT JAMIESON AND EDMUND FURTHMANN, ATTORNEYS.

It has been uniformly held in this State that a person in attempting to get on or off a moving railroad train was guilty of such negligence as to preclude a recovery. *C. & N. W. R. R. Co. v. Scates*, 90 Ill. 586; *Bash v. N. C. S. R. R. Co.*, 40 Ill. App. 584; *Hagan v. Philadelphia & Grey's Ferry Ry. Co.*, 15 Phil. 278; *Dietrich v. Baltimore & Hall Springs Ry. Co.*, 58 Md. Rep. 347; *Solomon v. Manhattan R. R. Co.*, 27 Am. and Eng. R. R. Cases, 155; *Rose v. West Phil. Ry. Co.*, 12 Atl. Rep. 78; *Halpin v. Third Ave. R. R. Co.*, 8 Jones & Spencer, 175.

APPELLEE'S BRIEF, NEWMAN & NORTHRUP AND S. O. LEVINSON, ATTORNEYS.

Appellee contended that the plaintiff was entitled to recover under any theory of the case.

It is not contributory (much less gross contributory) negligence to board a moving railway train, but such conduct must be viewed in the light of the surrounding circumstances,

and it is for the jury to say whether the negligence of the plaintiff is slight or gross. *C. & A. R. R. Co. v. Bonifield*, 104 Ill. 223; *Beach on Contributory Negligence*, Sec. 52; *Am. & Eng. Enc. of Law*, Vol. 2, p. 762.

There is no rule of law that riding or stepping upon the platform of a street car when in motion is negligence. *Messell v. Lynn Ry. Co.*, 8 Allen 234; *Cram v. Met. Ry. Co.*, 112 Mass. 38; *McGuire v. Middlesex Ry. Co.*, 115 Mass. 239; *Murphy v. Union Ry. Co.*, 118 Mass. 228; *Wills v. Lynn Ry. Co.*, 129 Mass. 351; *Fleck v. Union Ry. Co.*, 134 Mass. 480; *McDonough v. Met. Ry. Co.*, 137 Mass. 210; *Briggs v. Ry. Co.*, 148 Mass. 72; *N. C. St. R. R. Co. v. Williams (Ill.)*, 29 N. E. Rep. 672.

A boy twelve years old can not be held to the same degree of care as an adult, and he is only required to exercise such care as might be expected from a person of his age and discretion, and it is for the jury to determine this. *Wright v. Detroit, etc., Ry. Co.*, Mich. L. R. A., p. 843; *Weick v. Lander*, 75 Ill. 93; *Chicago & A. Rd. Co. v. Becker*, 26 Ill. 25; *City v. Keefe*, 114 Ill. 222; *Ill. C. R. R. Co. v. Slater*, 129 Ill. 99; *Shearman & Redfield on Negligence*, Sec. 49; *Wharton on Negligence*, Sec. 309.

That the negligence arising from the attempt of a plaintiff to board a moving street car, is not a question of law, but essentially a fact to be found by the jury. *Chicago & E. I. R. R. Co. v. O'Connor*, 119 Ill. 587; *Chicago City Ry. Co. v. Robinson*, 127 Ill. 9; *Chicago & A. R. R. Co. v. Adler*, 129 Ill. 335; *T. H. & I. R. R. Co. v. Voelker*, 129 Ill. 540; *Chicago, etc., Co. v. Lane*, 130 Ill. 116; *Mobile & Ohio R. R. Co. v. Davis*, 130 Ill. 146; *City of Chicago v. McLean*, 138 Ill. 148.

Street railroad companies are required to avail themselves of reasonable and well known safeguards against accidents, and they are liable for omissions. *Pierce on American R. R. Law*, 474.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

About seven o'clock on the morning of September 17, 1890, Gotthold B. Binder, a boy twelve years of age, hurried out

of a fruit store, about sixty feet from the corner of Fontenoy Court and Milwaukee avenue, and held up his hand as a signal for a cable car with a trailer, then at the corner, to stop.

That he meant that the holding up of his hand should be taken as a signal to stop, is but an inference, but it is a fair one. There is no proof that the gripman saw the boy, and the gripman testified that he did not. That the car had slackened speed at the corner is probable, but it had resumed its course, perhaps not at full speed. The boy ran toward the car, and caught the rear platform of the grip. To what extent he there got upon the step or got hold of any support, is in doubt, but at that instant there was a sudden acceleration of the speed—a “jump” the witness called it—and the boy fell and was run over and killed by the wheels of the trailer.

An ordinance of the city in evidence is: “Street cars shall stop to receive and let off passengers at the intersections of streets, and in such manner as when stopped not to interfere with the travel on cross streets; and in blocks more than five hundred feet in length, they shall stop, when so desired, to receive and let off passengers at the middle of such blocks.”

Now, stringent as are the obligations of passenger carriers toward passengers, their obligation toward the residue of mankind rests “merely upon grounds of general humanity and respect for the rights of others, and requires” them “to so perform the transportation service as not, wantonly or carelessly, to be an aggressor toward third persons, whether such persons be on or off the vehicle.” *C., B. & Q. R. R. v. Mehlsaack*, 131 Ill. 61.

And so in that case it was held that if Mehlsaack was stealing a ride on the platform steps of a car, he could not recover for the loss of his leg caused by the step coming in contact with an obstruction. The obstruction in fact was—I know from presiding at the trial—earth raised too high, by the side of the track, in repairing.

There is evidence here that guards surrounding the wheels

of the trailer were in common use, practicable and efficacious in preventing persons being run over by the wheels, and that this trailer had none.

Whatever may be the duty of the appellant toward passengers, it owed none of protection against the consequences of his own acts toward this unfortunate boy. Nor was it the duty of the driver of the grip car, whose attention, between stopping places, ought to be directed to what is before him, to see what was happening at places which he could not see, without diverting that attention from what he ought to see.

"There can be no negligence without the failure to observe some duty." Moran, J., in C. & W. I. R. R. v. Roath, 35 Ill. App. 349. The principle applied in that case as well as in Basch v. North Chicago St. Ry., 40 Ill. App. 588, and North Chicago Ry. v. Thurston, 43 Ill. App. 587, prevents a recovery here. See also, North Chicago St. Ry. v. Wrixon, No. 4930, this term.

The judgment is reversed and the cause remanded.

Sanitary District of Chicago v. Cook.

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57	528
51	424
101	1164

1. **EXCEPTIONS**—*Recitals of in Judgments—Surplusage*.—The recitals of exceptions in judgments are surplusage; exceptions can only be shown by a bill of exceptions.

2. **APPEALS**—*Imposing Conditions*.—Allowing an appeal upon condition that it shall not stay the execution of the judgment from which the appeal is taken, is indefensible. Appeals are matters of right without other than statutory conditions.

Memorandum.—Condemnation proceedings. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

CARTER & BARGE and JOHN P. WILSON, attorneys for appellant.

Sanitary District of Chicago v. Cook.

ARTHUR B. WELLS, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

April 6, 1893, the Sanitary District obtained judgment for condemnation of land taken, but not being satisfied with the price, prayed an appeal to the Supreme Court, which was allowed on bond to be filed within thirty days.

The judgment permitted the district to take the land upon, *inter alia*, depositing the amount awarded as compensation in a bank. April 14, 1893, the bond upon the appeal to the Supreme Court was filed.

April 27, 1893, a further judgment was entered, the portions of which here complained of being as follows: "It further appearing to the court that the said John A. Cook has filed his bond herein, with surety approved by the court, in the penal sum of thirty thousand (\$30,000) dollars, conditioned that in the event the amount finally awarded in the above entitled cause for the taking of said land, shall be less than the sum of forty-three thousand eight hundred and forty-five (\$43,845) dollars, then and in that case, said John A. Cook will pay, or cause to be paid, to said The Sanitary District of Chicago, the difference between said sum of forty-three thousand eight hundred and forty-five (\$43,845) dollars and the amount so finally awarded in said cause for the taking of said land and buildings.

"Now, therefore, it is ordered that said Globe National Bank of Chicago, Illinois, pay from said money so deposited with it, to said John A. Cook, the sum of forty-three thousand eight hundred and forty-five (\$43,845) dollars, and take his receipt therefor.

"To the entry of which order the petitioner does now except, and prays an appeal to the Appellate Court for the First District of the State of Illinois, which appeal is allowed upon the express condition that the allowance of said appeal shall in nowise hinder or delay the payment as aforesaid, by the said Globe National Bank of Chicago, Illinois, to said defendant, John A. Cook, of the said sum of money, but said money shall be paid the same as if no appeal had been allowed."

There is no bill of exceptions which we can regard. The appellee has filed what purport to be copies of fragments of a bill, but it is impossible to guess at the contents of the residue. The recitals of exceptions in the judgments are surplusage; exceptions can only be shown by a bill of exceptions.

It may be, for aught that appears, that the district had in some way abandoned its appeal as well as taken the land. *Matson v. Davies*, 35 Ill. App. 78, and cases there cited. Imposing as terms of allowing an appeal, that it shall not stay the execution of the judgment from which the appeal is taken, is indefensible, but we can do nothing about it. The condition is in the negative, and however much we may disapprove of it, we can not change it to an affirmative.

Appeals are of right without other than statutory conditions. *Emerson v. Clark*, 2 Scam. 489; *Haynes v. Haynes*, 68 Ill. 203.

The judgment is affirmed.

Feltenstein v. Stein.

1. RECORD—*Insufficiency*.—An insufficient record is a sufficient ground for dismissing an appeal.

Memorandum.—Appeal from the County Court of Cook County: the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the October term, 1893, and appeal dismissed for insufficiency of the record. Opinion filed February 13, 1894.

The statement of facts is contained in the opinion of the court.

MOSES, PAM & KENNEDY, attorneys for appellant.

G. W. NORTHRUP, JR., and S. O. LEVINSON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

When, if ever, a record in this cause gets here in such a shape that the merits of this controversy can be considered,

Leonard v. The Times.

the question will probably be, whether a signature of a judge to a line on the back of proper papers for a judgment by confession, which line is, "enter judgment herein for" (here amount is stated), such signature being made in the bedroom of the judge, away from the court house, with no clerk, sheriff, record, or appendage of a court present, other than the judge himself, out of humor with the lawyer who has waked him from a refreshing sleep, and the time being between midnight and two o'clock of a Monday morning, such papers being forthwith filed by a deputy of the clerk of the court, in the office of the clerk, and an execution made out and delivered to the deputy of the sheriff immediately, with nothing written up as a judgment on any record—all put together—give to the plaintiff in that execution any standing to question the title of the assignee of the defendant for the benefit of creditors, to the goods and chattels assigned.

This record is in such a fragmentary state that the appellee says the appeal should be dismissed, and the appellant assents to that being done, if we regard the record as insufficient. We do so regard it, and the appeal is dismissed.

Marion Leonard v. The Times, Chicago, et al.

1. **BILL OF EXCEPTIONS—Presumption from the Absence of.**—In the absence of a bill of exceptions the Appellate Court is bound to presume that a judgment of the lower court dismissing the suit was rightfully entered, there being nothing on the face of the record to show that it was not so done.

2. **LUNACY—Judgments Not Affected by.**—It is well settled that a judgment at law is neither void nor voidable merely because the plaintiff is a lunatic.

2. **LUNATIC—Suit by.**—A suit begun before a plaintiff is adjudged insane can properly be prosecuted in the name of the lunatic after he is so adjudged.

Memorandum.—Order dismissing suit. Error to the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

The statement of the facts is contained in the opinion of the court.

MARION LEONARD, plaintiff in error, *pro se*.

EWING & WINCHESTER, attorneys for defendants in error.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

On June 30th, A. D. 1886, the plaintiff in error having first obtained leave to sue as a poor person, began her suit in the Superior Court, Cook County, against the defendants in error in an action of libel, laying her damages at \$100,000.

On September 24, 1890, said suit was dismissed by order of the Superior Court for want of prosecution, at the cost of the plaintiff. It appeared on the motion to vacate the order dismissing the suit, that the plaintiff in error was, after trial on a charge of insanity, adjudged to be temporarily insane by the County Court of Cook County, on February 6, 1889, and was committed to the asylum at Dunning in this county, where she remained confined until a date subsequent to the dismissal of her said suit.

After regaining her liberty the plaintiff in error, at a term of court subsequent to that at which her said suit was dismissed, moved the said Superior Court to vacate and set aside the said judgment dismissing her said suit, at her costs, and for an order directing the clerk of said court to enter upon the records of said court a judgment for \$100,000 which she claimed to have recovered by default against said defendants at a term of court previous to that at which her said suit was dismissed, and before she was adjudged to be insane. This motion in various forms was renewed from time to time, the plaintiff in error there as here, acting as attorney, *pro se*, and was denied. This writ of error is prosecuted to obtain a review of the order denying said motion.

Conceding that the plaintiff in error has been most unfortunate, that she is a woman, poor, and without counsel to assist her, in her suit below, or in this court, she can not

rightfully expect her case to be considered differently from any other case with the same features.

The absence of a bill of exceptions made during the September term, 1890, of the Superior Court, or made in pursuance of an order entered at that term extending the time for the making of such a bill, deprives this court of authority to review the judgment dismissing the suit, for errors other than such as appear on the face of the record. And the lapse of the term at which the judgment was entered deprived the Superior Court of control over it, and for that reason it rightly denied the motion to vacate the judgment.

In the absence of such a bill of exceptions this court is bound to presume that the judgment dismissing the suit was right, there being nothing on the face of the record of that judgment that shows that it was not regularly entered.

The fact that the plaintiff in error was insane, and in duress because of having been adjudged to be so, when the suit was dismissed, affords no ground for relief here.

"It is well settled that a judgment at law is neither void nor voidable merely because the plaintiff is a lunatic." *Speck v. Pullman Co.*, 121 Ill. 33.

The suit was begun before the plaintiff in error was adjudged insane and could properly have been prosecuted in her name. *Speck v. Pullman Co.*, *supra*; *Chicago and P. R. R. Co. v. Munger*, 78 Ill. 300.

If the suit could have properly been prosecuted to judgment in her favor, judgment against her was not of itself error. Manifestly, if the judgment dismissing the suit can not here be disturbed, and the motion to vacate the same was properly overruled by the Superior Court, it follows that there was no error in denying the motion to record a judgment claimed by plaintiff in error to have been previously ordered to be entered upon the default of the defendants, for the reason that there was, when that motion was denied, no suit pending in which any order could be entered.

We discover in the record no error which warrants a reversal of the cause, and the judgment of the Superior Court must therefore be affirmed.

North Chicago Street R. R. Co. v. Eldridge.

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 51 430/
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 54 491
 51 430/
 52 300

1. **DAMAGES—Excessive.**—Judgments in cases for injuries will not be disturbed on the ground that the damages are excessive unless it is manifest that the verdict is against the evidence and is to be attributed to passion or prejudice on the part of the jury.

2. **DAMAGES—\$10,000 Not Excessive.**—The plaintiff, a lady stenographer, was in the act of alighting from a car while it was standing still; the bottom of her dress caught upon a bolt that protruded above the floor of the car and caused her to trip or stumble, or both, and fall to the ground, occasioning severe injuries to her; she was rendered unable to do anything in her business, in which for a year or more before the accident she had earned an average of seventy-five to eighty dollars a month. *It was held* that \$10,000 was not excessive.

Memorandum.—Action for injuries. In the Circuit Court of Cook County: the Hon. FRANK BAKER, Judge, presiding. Declaration in case: plea, not guilty; trial by jury; verdict for plaintiff, \$13,500; remittitur \$1,500; judgment for \$10,000; defendant appeals: heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

KEEF & LOWDEN, attorneys for appellant.

APPELLEE'S BRIEF, JOHN F. WATERS, ATTORNEY.

In actions of this character the assessment of damages is a matter within the sound judgment of the jury, and the court should not interfere with their finding, unless they are so manifestly excessive as to give evidence of passion and prejudice on the part of the jury. Even though the Appellate Court may feel better satisfied with a smaller verdict, that of itself would not be a sufficient ground for setting it aside. *City of Chicago v. Crooker*, 2 Brad. 281.

Damages held not to be excessive. \$5,000 not excessive for a workman for a mere "stiffness" in his hand. *T. W. W. R. Co. v. Fredericks*, 71 Ill. 294.

\$8,000 not excessive where a music teacher lost her hand. *C. & A. R. R. Co. v. Wilson*, 63 Ill. 107.

\$8,000 not excessive for an injury to a lady's spine. *Ill. Cent. R. R. Co. v. Parks*, 88 Ill. 373.

\$25,000 was held not to be excessive for a serious injury

North Chicago St. R. R. Co. v. Eldridge.

to the spine. C. & E. I. R. R. Co. v. Holland, 18 Brad. 418.

\$10,000 not excessive for a locomotive fireman, who was badly scalded, and confined for two months, and unable to do any hard work for more than a year after the accident. St. L. & S. F. R. R. Co. v. McClain, 15 S. W. Rep. 789.

\$10,000 not excessive for injuries consisting of loss of leg at the ankle, causing disability to work for a year, and decreasing earning power, wound being extremely painful. Taylor v. Mo. P. R. Co. (Mo.), 16 S. W. Rep. 206.

\$12,000 not excessive for injury to brakeman, twenty-two years old, who had earned \$60 per month, and was unable to work for two years, and his earnings had decreased to \$10 per month. Trinity & S. R. Co. v. Lane (Tex. 1891), 15 S. W. Rep. 477.

\$12,040 not excessive for injury to arm of person depending on manual labor for support, greatly reducing her earning capacity. Coast Line R. Co. v. Boston, 83 Ga. 387.

\$14,167 not excessive for injury to leg disabling person for life. Gal. H. S. A. R. Co. v. Porfert, 72 Tex. 344; 37 Am. & Eng. Cas., 540.

\$15,000 not excessive for injury to engineer incapacitating him from any labor, and depriving him of the sense of hearing. Tex. P. R. Co. v. Johnson, 42 Am. & Eng. R. Cas. 7.

\$16,000 not excessive where plaintiff was permanently injured, and his heart displaced and enlarged. Ga. P. R. Co. v. Dooley (Ga. 1890), 12 S. E. Rep. 923.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was a passenger on the car of the appellant. The car was an open one, with seats running crossways, and was boarded and alighted from on the sides, at the end of the seats, by stepping on a foot-board suspended by iron bolts from the floor of the car, and running its entire length.

In the act of alighting from the car while it was standing still, the bottom of her dress, as she says, caught upon a bolt, or something, that protruded above the floor of the car, and caused her to trip or stumble, or both, and fall to the ground, occasioning severe injuries to her.

The jury gave appellee a verdict for \$18,500, from which at the suggestion of the court, \$3,500 was remitted, and thereupon judgment was entered for \$10,000 against appellant.

Even at the reduced amount the judgment seems to be a large one, but it is doubtful if it be so large as to justify a reviewing court to set it aside on that ground. It is well settled, both in this court and the Supreme Court, that judgments in cases of this character will not be disturbed on the ground that the damages are excessive, unless it is manifest that the verdict was against the evidence, and is attributed to passion or prejudice on the part of the jury.

The evidence shows that in addition to the external bruises and the pain suffered by the appellee, internal injuries of a serious and disabling kind were occasioned to her, which have assumed, according to the testimony of the physician who was her attendant, a chronic or permanent form, and that from the time of the injury to the time of the trial, a period of more than two years, she had, as she testified, been unable to do anything in her business, which was that of a stenographer, in which for a year or more before the accident she had earned an average of \$75 to \$80 a month.

The defense, so far as the facts are concerned, was that the fall of appellee, which was not disputed, occurred from her stumbling or tripping after she had left the car and while she was hastening across the other track of the appellant in order to avoid an approaching car, and to reach another car waiting for her, to which she intended to transfer herself; and, furthermore, that the bolt upon which she claims her dress caught did not contribute in any way to her fall.

The appellee was traveling south on the west or south bound track, and it is undisputed that she finally fell to the ground at some point on the further or east side of the north bound track, at a distance of at least ten feet from the inside, or east, rail of the track on which the car she had ridden in was being run. The plat in evidence shows that each track, consisting of two rails, is five feet in width, and that the tracks are five feet apart, and the appellee herself testified that she

fell after she had crossed the intervening space between the two tracks, north and south bound, and the east rail of the north bound track.

The substance of her description of the manner of her fall, was, as we gather it from her testimony, that as she stepped from the foot rail of the car, her dress caught on the bolt and prevented her feet from touching the ground, as they naturally would do, and destroyed her equilibrium; that she would then have fallen to the ground but for the fact that her dress tore loose from the bolt, and let her go forward, and that in her effort to recover her equilibrium, her momentum and weight carried her along, and across the other track before she finally fell.

In corroboration of her testimony, the appellee offered in evidence, and it was received over the objection and exception of appellant, a piece of the dress which she wore at the time of the accident, showing the particular back and bottom part of the dress, with braid on it, which was, as she testified, caught and torn.

That an accident, such as appellee described, could easily have happened, if there was a convenient bolt for a dress to catch upon, needs hardly to be said.

Although other witnesses testified, in behalf of appellant, that they saw nothing to indicate to them that the falling of appellee was caused by the catching of her dress, and that they saw no indication that she was going to fall until she was well away from the car she had left, and notwithstanding her fall may have arisen from a variety of causes for which the appellant was in no manner responsible, we are not at liberty to usurp the functions of the jury who saw and heard all the witnesses in the case testify, and say they came to a wrong conclusion.

It was proved in the case that there was a bolt, or bolt head, that projected from one-half to three-quarters of an inch above the floor of the car at or about where she stepped from the floor of the car to the foot rail. The bolt was used to hold the foot board upon which passengers step in getting on and off the car, and was so placed that a dress might

drag over it when the wearer was in the act of alighting from the car, and it is apparent from a photograph of the car introduced in evidence and made a part of the bill of exceptions, that under certain conditions, such as looseness of the bolt, or roughness of the bolt head, or perhaps other conditions, the braided bottom of a woman's dress dragged over the bolt head there shown, might catch and produce exactly the result described by the appellee.

In addition to the photograph before referred to as being in evidence, the jury by consent of both parties inspected the car itself, which, it was agreed by both sides, was, at the time of inspecting it, in the same condition as at the time of the accident.

What they saw we have no means of knowing and can not review. Whatever, if anything, was lacking in the other evidence to convict the appellant of negligence, we must presume was supplied by such inspection.

That a bolt, in the position indicated, might be very dangerous to women passengers clothed in the prevailing fashion, in getting off a car, is too plain to need argument.

That the bolt in question was dangerous, the jury have found, and their finding rests in part, at least, upon evidence derived from a personal inspection of the bolt in the car itself, which is not before us, but binds us.

The instructions given and refused were very numerous, and many objections on account of them are raised. It would add nothing to the value of this opinion to take up such objections and answer them specifically and in detail, and we will therefore rest content by saying that, in our opinion, the jury were instructed fairly and fully by the instructions that were given, and that the court did not materially err in refusing such as were not given.

The judgment of the Circuit Court will be affirmed.

Doremus v. Clarke.

Doremus v. Clarke.

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1. VERDICT—*Against the Weight of the Testimony.*—A verdict which is manifestly against the weight of the testimony should be set aside; a judgment based upon it will be reversed.

Memorandum.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 13, 1894.

The statement of facts is contained in the opinion of the court.

FRANCIS A. RIDDLE and FRANK B. DYCHE, attorneys for appellant.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was recovered upon evidence so strongly preponderating against the appellee, who was plaintiff below, that we are unable to discover any reasonable justification for it. The appellee apparently has no faith in its justice, for she does not appear in this court in its defense.

The dispute was a mere matter of accounting, and from the record as presented to us, which we have, although unaided by appellee, diligently examined, we can not see how the judgment can be upheld. It looks very much as if the judgment ought to have been considerably in favor of the appellant.

We will therefore reverse and remand the cause.

Oehmen v. Thurnes.

1. BILL OF EXCEPTIONS.—*Must Contain the Evidence Relied Upon.*—When a bill of exceptions does not show what the testimony of the witnesses excepted to, was, leaving the court uninformed whether the evidence that was heard by the trial court had even a tendency to establish the matters set up by way of defense, it will be presumed that the

evidence heard by the trial court, but not shown to the Appellate Court, justified the court in finding the issues for the plaintiff and rendering judgment against the defendant.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 18, 1894.

The statement of the facts is contained in the opinion of the court.

C. S. DARROW and J. C. TURNES, attorneys for appellant.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action by the payee against the guarantor of a promissory note. The plea was the general issue accompanied by notice of special matter of defense. The cause was submitted to the court without a jury, and on the trial parol evidence of the special matter of defense was offered by the defendant, the appellant here. Objection to such evidence was made by the plaintiff, the appellee here, upon grounds questioning the competency and admissibility of the offered evidence, and, without ruling upon the objection, the court heard the testimony of three witnesses called by the defendant, subject to the objection interposed by the plaintiff, and took the cause under advisement upon authorities furnished by counsel pertaining to the legal admissibility of such testimony, and, upon consideration, found the issues for the plaintiff and gave judgment in his favor. It is from that judgment this appeal is prosecuted.

The bill of exceptions consists of a copy of the note and guaranty sued on, and as follows:

“And thereupon the defendant was called in his own behalf, as well as Jacob C. Turnes and Mary A. Turnes, to give evidence in support of the notice of defense filed in said cause, to which testimony the plaintiff objected, for the reason that the matter and things contained did not constitute a proper or valid defense in this action, whereupon the court heard the testimony of such witnesses, subject to such objection of plaintiff, and thereupon the court took said cause under advisement upon authorities to be furnished by

Kerting v. Hilton.

counsel pertaining to the legal admissibility of such testimony, upon which consideration the court found the issues for the plaintiff, and assessed the damages at \$446.59.

Which was all the evidence introduced on the trial of said cause."

Signature and seal of the judge.

There is nothing in the bill of exceptions, or elsewhere in the record, to show what the testimony of the three witnesses in behalf of the defendant was, and we are wholly uninformed whether the evidence that was heard by the court had even a tendency to establish the matters set up by way of defense.

We are therefore bound to assume that the evidence heard by the court, but not shown to us, justified the court in finding the issues for the plaintiff and rendering judgment against the defendant. *Garrity v. Hamberger*, 136 Ill. 499.

The judgment of the Circuit Court will be affirmed.

Kerting v. Hilton.

1. **OPTION CONTRACT—What is.**—An agreement providing for the employment of a party in a manufacturing business and giving him the privilege of buying the plant on or before a day mentioned but containing no promise or undertaking on his part to buy it, is a mere option and void under the statute.

Memorandum.—Chancery. Bill to have an option contract declared a mortgage. Appeal from an order dismissing the bill entered by the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, BARNUM, HUMPHREY & BARNUM,
ATTORNEYS.

Appellants contended that the showing is clear that both of the agreements dated December 4th and December 13th,

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were wrung from Kerting by abusing the advantage which the mortgagee had over the mortgagor, and by taking advantage of the distress and ignorance and helplessness of Kerting, the mortgagor.

The law bearing on this subject is and always has been plain. It is well understood and has been often administered by the court. We need only cite a few authorities in deference to the rules of court appertaining to briefs. *Brown v. Gaffney*, 28 Ill. 149; *Tennery v. Nicholson*, 87 Ill. 464; *Scanlan v. Scanlan*, 134 Ill. 645; *Conant v. Riseborough*, 139 Ill. 388; *Russell v. Southard*, 12 How. (U. S.) 139; *Peugh v. Davis*, 96 U. S. (6 Otto), 332; *Brick v. Brick*, 98 U. S. (8 Otto), 516; *Hayworth v. Worthington*, 5 Blackf. 361; *Miller v. Green*, 37 App. (Ill.) 635; 1 *Jones on Mort.*, Secs. 273, 293; *Story's Eq. Jur.*, Sec. 222; *Preschbaker v. Feaman*, 32 Ill. 485; 2 *Jones on Mort.*, Secs. 1039, 1042; 2 *Story's Eq. Jur.*, Sec. 1019; *Bearss v. Ford*, 108 Ill. 16; *Beach Eq. Jur.*, Secs. 407, 412, 413, 416.

APPELLEE'S BRIEF, FLOWER, SMITH & MUSGRAVE, ATTORNEYS.

Appellee contended, that to establish that a transfer absolute on its face was in fact a mortgage, the proof must be clear and convincing. The question is one of the intention of the parties. *Eames v. Hardin*, 111 Ill. 634; *Porrington v. Akhorst*, 74 Ill. 490; 1 *Beach on Equity*, Sec. 414.

One of the distinguishing tests to determine whether an instrument is a mortgage or a sale with the privilege of repurchasing, is the existence or non-existence of a debt to be secured. If there be no debt due from the grantor to the grantee, there can be no mortgage. *Rue v. Dole*, 107 Ill. 275; *McKinstry v. Conley*, 12 Ala. 478; *McGee v. Catching*, 33 Miss. 672.

The fact that the original transaction was in the nature of a loan is not conclusive, nor does the rule once a mortgage, always a mortgage, control the transaction. *Quick v. Rodman*, 5 Duer, 285 (N. Y.); *Moss v. Green*, 10 Leigh (Va.) 251.

Kerting v. Hilton.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The property which, with such changes as have come in the course of business, is the cause of this suit, was, on May 30, 1890, assigned by the Kerting Lithographing Co.—of which the appellant held the majority of the stock—for the benefit of creditors. It was bought for \$2,750 by F. N. Gage & Co. from the assignee, and by them sold November 1, 1890, to I. G. Hatcher for \$5,000, who had the day before made an agreement with the appellant that he might have the property on or before December 4, 1890, for \$5,500. The agreement is voluminous, and contains many other stipulations not material in this controversy. December 4, 1890, Hatcher conveyed to the appellee, by a bill of sale, which recited, “for and in consideration of the sum of \$5,500 lawful money of the United States of America, to him in hand paid, at or before the ensealing and delivery of these presents by Mr. William K. Hilton, in trust for Frank Kerting, party of the second part,” *habendum*, “to and for his own proper use and behoof forever, unless redeemed by said Frank Kerting on or before March 4, 1891.”

On the same date as the last mentioned bill of sale, an agreement between these parties was made which recited that the appellee, “at the request of said Kerting, has this day purchased,” “and a trust is reposed in,” the appellee, “which trust in said bill of sale was so declared in favor of said Kerting because he was vested with the sole option and legal right to purchase” from Hatcher.

December 13, 1890, a new agreement was executed between the parties, which *inter alia* said “that the said Hilton is hereby declared to be the absolute owner of the said property, freed from any trust in favor of said Hilton.” Both of the agreements between these parties provided for the employment of the appellant in the business, and gave him the privilege of buying the lithographic plant on or before March 4, 1891, but contained no promise or undertaking on his part ever to buy it. He had a mere option, void under the statute. *Schneider v. Turner*, 27 Ill. App. 220; 130 Ill. 28; *Corcoran v. Lehigh & Franklin Coal Co.*, 37 Ill. App.

577; S. C., 138 Ill. 390; *Locke v. Fowler*, 41 Ill. App. 66. It matters not how good the consideration, or what the inducement, for such a contract.

This view of the case makes all inquiry into the charges of fraud and oppression contained in the bill, useless, as the whole theory of the appellant's case is based upon the validity of his option to buy. He has never put anything but his labor—for which probably he has been paid a salary—into the business, and if he is, under either of the agreements, entitled to a share of any profits, this bill is not for them. The object of this bill is, in effect, a specific performance of his option to buy.

The decree dismissing the bill is affirmed.

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West Chicago Street Railroad Co. v. Bode.

1. DAMAGES—\$12,500 *Not Excessive*.—Where a man, something over sixty years of age, sustained injuries from an accident on a street car, rendering him an invalid and incapable of performing manual or mental labor in the future, *it was held*, that a verdict for \$12,500 was not excessive.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1898, and affirmed. Opinion filed February 4, 1894.

The statement of facts is contained in the opinion of the court.

KEEP & LOWDEN, attorneys for appellant.

JOHN C. RICHBERG, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was a passenger on a car of the appellant on the 20th day of May, 1891, and was then injured by an accident, liability for which is not contested by the appellant.

A physician, witness for the appellee, testified that the

Milligan v. Nelson.

appellee was in good health, a little deaf in the left ear, before the accident, and is an invalid since, will grow worse, and is incapable of performing manual or mental labor in the future; and that at the time of the trial, May 11, 1893, the witness believed the appellant to be something over sixty years old. There was no other evidence as to the age or health of the appellee. Before he was hurt he worked at a lathe for manufacturing jewelry and received either fifteen or sixteen per week.

The verdict and judgment are for \$12,500. The only question in the case is whether the amount is excessive. We do not feel justified so to decide. *Chicago City Ry. v. Wilcox*, 33 Ill. App. 450; *Chicago v. Leseth*, 43 Ill. App. 480. Affirmed.

MR. JUSTICE WATERMAN dissents.

Milligan et al. v. Nelson.

1. NUISANCES—*Smoky Chimneys—Injunctions*.—An injunction which restrains a defendant at all times from permitting dense smoke to be emitted from his chimneys, where it is obvious that the smoke could do no harm to the complainant when the wind blew it away from him, is too broad.

2. LAW—*Administration of Must be Practical*.—The administration of the law should be practical—adapted to the conditions and necessities of civilization. Courts do not exist for their own sake, but as adjuncts to, and safeguards of, the interests of the great body of the people who do the actual work of the world.

WATERMAN, J., dissenting.

3. NUISANCES—*Smoke and Soot*.—The casting of smoke and soot into and upon the premises of another, to the injury of his furniture and draperies, and the physical annoyance and discomfort of his family, is a nuisance, and persons are entitled to be protected therefrom.

Memorandum.—Bill for an injunction. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

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88	611

G. W. & J. T. KRETZINGER, attorneys for appellants.

APPELLEE'S BRIEF, WOLSELEY & HEATH, ATTORNEYS.

Dense smoke is a nuisance which can be restrained by a court of equity. A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. (3 B. L. Com. 216.) Any unwarrantable, unreasonable, or unlawful use, by a person, of his own property, real or personal, to the injury of another, comes within the definition stated. *Lafin v. Tearney*, 131 Ill. 326; *Calef v. Thomas*, 81 Ill. 480; *Ottawa Gas Co. v. Thompson*, 39 Ill. 600.

Whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance. *Wahle v. Reinbach*, 76 Ill. 327; *Seacord v. People*, 22 Ill. App. 281.

The nuisance complained of in this case is both a public and a private one; public as to all who may come within its range, and private as to the appellee, who suffers a special injury, owing to the proximity of his home and property to the nuisance.

The doctrine now is, that a nuisance may be at the same time both public and private. The use of a steam engine in a crowded street may be a public nuisance. But in the case where the smoke from it also injured the goods in a man's shop, and made his dwelling uncomfortable, it was held to be such a private nuisance as would give him a right of action. *Wylie et al. v. Elwood*, 134 Ill. 287.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants are lessees and operators of an eight-story hotel on Fifty-first street, and the appellee has a fine residence about one hundred feet south of the hotel.

He complains that from the chimneys of the hotel the appellants permit dense smoke, dust and soot to issue, to the great annoyance and discomfort of himself and family and to the great damage of his furniture, etc. He filed this bill to enjoin them, and on the hearing the court by

decree perpetually enjoins them, "their agents, servants and employes, from permitting or allowing dense smoke to be emitted from any of the chimneys of the" hotel.

The cause was heard by agreement upon the affidavits, on both sides, filed upon the application for a temporary injunction and the bill and answer, no replication appearing in the record. As to the evidence it may fairly be said that everything as to the actual nuisance by smoke is denied with as much emphasis, and with as great a volume of testimony by one side, as it is alleged by the other.

The administration of the law should be practical—adapted to the condition and necessities of civilization. Courts do not exist for their own sake, but as adjuncts to, and safeguards of, the interests of the great body of the people who do the actual work of the world.

Those who seek and enjoy the advantages of life in a great city must take them with all the inevitable drawbacks that attend the concentration of a large population, and the industries in which that population is engaged. The air of open fields can not be hoped for in the streets of a commercial and manufacturing metropolis.

This record shows that in the same immediate neighborhood with these parties are many other structures using a good deal of steam, to produce which a large quantity of coal is consumed. It may be that if anthracite coal were used there would be less smoke; but may we interdict the use of practically the only fuel supplied by nature to several great States upon whose prosperity Chicago lives and grows? We need not now go into a consideration of that question.

Besides the structures before mentioned it is alleged, and not denied, that the Illinois Central Railroad is within about five hundred feet of the residence of the appellee, and that about four hundred locomotives pass thereon daily, and that the greatest amount of smoke in that neighborhood comes from those locomotives; yet the appellee swears that he has not suffered any damage from that cause.

It is obvious that smoke emitted from the chimneys of the hotel could do no harm to the appellee whenever the wind would blow it in a direction away from the place of his residence, and that not less than three-quarters of the compass would be open to the appellants; yet this injunction is absolute against dense smoke at all times.

Should this injunction stand it would be a foundation for interminable proceedings hereafter. It does not prohibit smoke (by itself smoke) but dense smoke. Dense is an adjective which, in the mouths of different witnesses, would, by some, be applied to steam somewhat darkly tinged, and by others be withheld from clouds black as Erebus. The affidavits in this record illustrate this difference of views.

The woman of Samaria, who, after a few minutes conversation at the well tells her neighbors, "Come, see a man, which told me all things that ever I did," would see the color of "the smoke of their torment" that "ascendeth up for ever and ever," or "of the great white throne," as her bias might happen to be.

Upon an application to punish for breach of this injunction there would be as great difficulty in arriving at the truth, as is so humorously described by Chancellor Walworth in *De Rivafronli v. Corsetti*, 4 Paige 264, in relation to opera music. It is clear that the appellee can be entitled to an injunction only when the wind would turn the smoke upon him, or a calm would permit it so to settle.

On the whole case the facts are too doubtful, and the remedy too difficult and uncertain of application, to justify an injunction.

It is not the theory of the bill that the appellee is entitled to an injunction against smoke—all smoke—but only against dense smoke.

Who can anticipate the mind of the chancellor when he shall be called upon to compare that adjective or to separate smoke from the chimneys of the appellants from that emanating from other sources? This is a case for a chancellor to "consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving

Milligan v. Nelson.

the party to his redress at the hands of a court and jury." Richards' Appeal, 57 Pa. St. 105.

The decree is reversed and the cause remanded with directions to the Superior Court to dismiss the bill at the cost of the appellee. Reversed and remanded.

MR. JUSTICE WATERMAN, DISSENTING.

I think that the decree in this cause should be reversed and the cause remanded for a modification of the injunction.

In a growing city such as is Chicago, injunctions of this kind should not be made perpetual.

The character of neighborhoods so change here that the doing of that which is a nuisance at a particular place, five years thereafter may cease to be, there, such. Injunctions of this kind should, therefore, in rapidly growing and changing towns, be for limited periods, or leave should be given in the order, to, after a certain time, apply for a dissolution or modification of the injunction.

The bill in this case is brought by an individual, not by the representatives of the public; the decree therein should have reference only to the rights of the complainant in respect to the premises in the enjoyment and use of which the complainant has been injured. It is not merely the emitting of the dense smoke from the chimneys of appellant that has damaged the complainant; it is because, as found by the decree, the air in and about his premises has been and is filled with dust and soot issuing from the chimneys of said hotel, to complainant's annoyance and discomfort; because "the soot falling from the chimneys of said hotel has sifted through the doors of complainant's dwelling house so that complainant could not keep the draperies, carpets, etc., in his house free from soot;" and because "when the wind blew from said hotel building in the direction of complainant's dwelling house he could not open his windows without having dust, smoke and soot enter into his said dwelling house to the great damage of his furniture, draperies, etc., and to the physical discomfort and annoyance of his family," and because "it is impossible for him to keep his furniture, etc.,

free from soot, and that the porch, steps and roof of complainant's said dwelling house could not be kept clean or free from the soot and dust proceeding from appellant's said chimney," that complainant has suffered damage. It is on account of the doing of these things, an injury and nuisance to complainant in the use and enjoyment of his said premises, that he is entitled to relief; and the injunction should restrain the doing of these things. The restraint should not be in this case against the emitting of dense smoke, for it does not appear that with the wind in certain directions such emission would be a nuisance or injury to complainant. *Kerfoot v. People*, No. 180, October term, 1893, Ill. App.; *Attorney General v. Newberry Library*, 51 Ill. App. 166.

The casting of smoke and soot into and upon the premises to the injury of furniture and draperies, and the physical annoyance and discomfort of his family is a nuisance; and appellee is entitled to be protected therefrom the same as appellant would be entitled to protection from noxious and unwholesome odors emitted from an establishment for rendering dead horses into oil, converting their hides into leather, and their hoofs into glue, should appellee's premises be converted into such a factory. *Laffin v. Tearney*, 131 Ill. 326; *Calef v. Thomas*, 81 Ill. 480; *Ottawa Gas Co. v. Thompson*, 39 Ill. 600; *Harmon v. City of Chicago*, 110 Ill. 406; *Ross v. Butler*, 19 N. J. Eq. 298; *Wood on Nuisance*, Sec. 505; *Rex v. Waterhouse*, L. R. 72, B. 545; *Crump v. Lambert*, L. R. 3 Eq. 409; *High on Injunctions*, Sec. 773; *Wahle v. Reinbach*, 76 Ill. 326.

The maxim *sic utere tuo ut alienum non lædas*—so use your own property as not to injure that of another, is as applicable to the great hotel of appellant as to the small dwelling of appellee, and restricts the pouring of soot and smoke upon the premises of another in the same way that it would restrain appellee from driving the guests of this hotel away by sickening odors arising from the carrying on of a lawful business. This hotel is situated in a residence neighborhood, and it is fair to presume that its proprietors desire that such should continue to be the character of its

Great Western Telegraph Co. v. Lowenthal.

surroundings; that they would strenuously object to the erection about it of packing houses, soap factories and tanneries.

Being in a residence neighborhood, complainant has a right to be protected in the enjoyment of his dwelling house, from such things as are incompatible with the physical comfort and health of his family, and are nuisances.

It is not a sufficient answer for appellants, in effect, to say that considering the magnitude and nature of their establishment they have done, and are doing, the best they can, unless they use hard coal, to prevent appellee from being annoyed, his physical comfort destroyed, and his furniture ruined by the smoke from their chimneys, and that other establishments in that vicinity also send out a great deal of smoke. Cartwright v. Gray, 12 Grant's Chy. (Ont.) 399-404; Crump v. Lambert, *supra*; Cropley & Son, Limited, v. Lightowler, L. R. 3 Eq. Cas. 279; 1 Wood's Law of Nuisance, 694; Hilliard on Injunctions, 341; 1 High on Injunctions, Sec. 746; 2 Story's Eq. Jur., 11th Ed., Sec. 927 d.

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Great Western Telegraph Company v. Lowenthal.

1. STOCKHOLDER—*Who is Not.*—Where a person subscribed for the capital stock of an incorporated company after its entire capital stock had already been subscribed for, *it was held*, that his subscription was void, and that he was not a subscriber to the stock of the company.

Memorandum.—Suit against a stockholder. Error to the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

THOMAS J. SUTHERLAND, attorney for plaintiff in error.

ROSENTHAL & HIRSCHL, attorneys for defendant in error.

MR. JUSTICE GARY' DELIVERED THE OPINION OF THE COURT.

On the 16th day of May, 1868, the defendant, here as well as below, signed a subscription list of shares in the Telegraph Co. for one hundred shares, for which he has never paid anything. Among other defenses—which need not be noticed—he showed by the articles of the company, dated the 2d day of December, 1867, acknowledged the 12th day of May, 1868, and filed in the office of the Secretary of State on the 17th day of July, 1868, that all the stock of the company had been taken by other persons at the date of the articles.

It is pretty clearly intimated in the case of this plaintiff v. Bush, 35 Ill. App. 213, that we then thought that this defense was a good one, if not avoided by some answer to it. *Scovill v. Thayer*, 105 U. S. 143, accords with that intimation. We held Bush liable because, upon the circumstances he had, as we held, elected to take the position of a stockholder under the decree of the Circuit Court made in pursuance of the opinion of the Supreme Court in *Terwilliger's* case, 59 Ill. 249.

Here the defendant never did anything under that decree, and indeed never was in a position to take shares under it. Only those who had paid something on their subscriptions could take. The defendant never had any claim upon the company, nor did the company ever have any claim upon him. The assessment decree is against stockholders as a class; who are stockholders is to be proved.

As to the defendant the proof fails and the judgment is affirmed.

Snow et al. v. Macfarlane et al.

1. **CONTRACTS.**—*Can Not be Varied by Parol.*—The legal effect of a writing—what it means by express words or by implication—can not be varied by parol.

2. **TRUSTEES.**—*Not to Speculate on the Funds.*—Persons standing in a fiduciary relation have no right to speculate upon the interests com-

Snow v. Macfarlane.

mitted to their care, or to put themselves in a position adverse to the interests of the appellants.

3. AGENTS.—*Benefits Belong to the Principal.*—In any contract of purchase and sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome.

Memorandum.—Chancery proceedings. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

PENCE & CARPENTER and OLIVER & SHOWALTER, attorneys for appellants.

APPELLEE'S BRIEF, J. S. HUEY, R. S. THOMPSON AND JAMES R. MANN, ATTORNEYS.

In all cases where a person is either actually or constructively agent of a person, all profits and advantages made by him in the business beyond his ordinary compensation, are to be for the benefit of his employer. Paley on Principal and Agent, 51.

And not only interest, but every other sort of profit or advantage, clandestinely derived by an agent from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for. Love et al. v. Hoss, 62 Ind. 255.

A real estate broker who, for a specified compensation, agrees with the owner of a tract of land to negotiate the sale of the same for a particular price, is liable to his principal without demand, for any excess received by him in making sale of such tract, concealed by him from his principal. Dodd v. Wake, 26 N. J. Eq. 484.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

On the first day of August, A. D. 1890, the appellees were the owners of lands in section 1, township 39, range 14, in Cook county, which at the price of \$2,500 per acre amounted

VOL. 51.]

Snow v. Macfarlane.

to \$262,080. The legal title, in trust for them, was in one Samuel W. Jackson.

The appellants composed the firm of Snow & Dickinson, real estate agents.

On the day named the appellees gave to the appellants a paper as follows:

“August 1st, 1890.

SNOW & DICKINSON:

Gentlemen: We, the undersigned, owners of the property on the other side of this sheet, give you the exclusive agency to sell the same for thirty days hereafter for the sum of \$2,500 per acre in bulk, entire tract, according to the acreage thereon printed. Terms, quarter cash. Purchaser to assume present mortgage of \$136,000, balance to be arranged between us in second mortgage.

If this is sold in less bulk than entire tract, prices are to be as marked on this plat. Terms to be agreed upon between us.

If sold by you before thirty days from this date, we agree to pay you three per cent commission for selling the same.

JOHN W. MACFARLANE,
H. S. REYNOLDS,
W. H. PRIDMORE,
S. B. FOSTER,
W. A. PRIDMORE.”

The signatures are of the appellees. On the twenty-third of that month the appellants and Sherburn Bryant made this contract:

“This memorandum witnesseth, that Samuel W. Jackson, by Snow & Dickinson, his agents, hereby agree to sell, and Sherburn Bryant agrees to purchase, at the price of \$288,288, the following described real estate in the county of Cook, in the State of Illinois: Blocks one (1) to six (6), both inclusive, and eight (8) to twenty-five (25) both inclusive, in Stony Island Heights Subdivision, being a subdivision made by the Calumet and Chicago Canal and Dock Company, of part of the southwest quarter of section one (1), town-

Snow v. Macfarlane.

ship thirty-seven (37) north, range fourteen (14) east of the third principal meridian. Subject to all taxes and assessments levied after the year 1889, and any unpaid special taxes or assessments levied for improvements not yet made. Also subject to an incumbrance of \$131,365, payable as follows: \$40,587 on or before May 29, 1891; \$45,389 on or before May 29, 1892; \$45,389 on or before May 29, 1893, with interest at the rate of six per cent per annum, payable semi-annually, which incumbrance, with interest from this date, the said purchaser hereby agrees to assume and pay as part of the consideration hereof.

Said purchaser has paid \$5,000 as earnest money to be applied on said purchase when consummated, and agrees to pay within five days after the title has been examined and found good, the further sum of \$91,208, at the office of Snow & Dickinson, in Chicago, provided a good and sufficient general warranty deed, conveying to said purchaser a good title to said premises, with waiver and conveyance of any and all estates of homestead therein, and all rights of dower, inchoate or otherwise (subject as aforesaid) shall then be ready for delivery. The balance to be paid as follows: \$60,715, on or before one year from this date, with interest from this date at the rate of six per cent per annum, payable semi-annually, to be secured by notes and mortgage, or trust deed of even date herewith, on said premises, in the form ordinarily used by Snow & Dickinson. A complete abstract of title or merchantable copy to be furnished within a reasonable time, with a continuation thereof brought down to cover this date. In case the title, upon examination, is found materially defective within ten days after said abstract is furnished, then, unless the material defects be cured within sixty days after written notice thereof, the said earnest money shall be refunded and this contract is to become inoperative.

Should said purchaser fail to perform this contract promptly on his part at the time and in the manner herein specified, the earnest money paid as above shall, at the option of the vendor, be forfeited as liquidated damages, includ-

ing commissions payable by vendor, and this contract shall be and become null and void. Time is of the essence of this contract, and of all the conditions thereof. This contract and the said earnest money shall be held by Snow & Dickinson for the mutual benefit of the parties hereto.

In testimony whereof, the parties hereto set their hands this 23d day of August, A. D. 1890.

SAMUEL W. JACKSON,
By Snow & Dickinson, Agts.
S. BRYANT."

On the same day last named, Jackson, at the instance of the appellants and one George I. Hicks, who was a clerk in their office, made this paper:

"THIS MEMORANDUM WITNESSETH: That Samuel W. Jackson hereby agrees to sell, and George I Hicks agrees to purchase, at the price of \$262,080, the following described real estate, situated in Cook County, Illinois: Blocks 1 to 6, both inclusive, and 8 to 25, both inclusive, in Stony Island Heights Subdivision, being a subdivision made by the Calumet and Chicago Canal and Dock Company of part of the southwest quarter of section one (1), township 37 north, range 14 east of the third principal meridian. Subject to all taxes and assessments levied after the year 1890; any unpaid special taxes or assessments levied for improvements not yet made; also subject to an incumbrance of \$131,365, payable as follows: \$40,587 on or before May 29, 1891; \$45,389 on or before May 29, 1892, and \$45,389 on or before May 29, 1893, with interest at the rate of six per cent per annum, payable semi-annually, which incumbrance, with interest from this date, the said purchaser hereby agrees to assume and pay as part of the consideration hereof.

Said purchaser has paid \$5,000 as earnest money, to be applied on said purchase when consummated, and agrees to pay, within five days after the title has been examined and found good, the further sum of sixty-five thousand (65,000) dollars, at the office of Snow & Dickinson, Chicago, provided a good and sufficient general warranty deed, to Sherburn Bryant, conveying to said Bryant a good title to said premises with waiver and conveyance of any and all charges of

Snow v. Macfarlane.

homestead therein; and all rights of dower, inchoate or otherwise (subject as aforesaid), shall then be ready for delivery. The balance to be paid as follows: \$160,715 on or before one year from this date, with interest from this date at the rate of six per cent per annum, payable semi-annually, to be secured by notes signed by Sherburn Bryant, and mortgage, or trust deed, of even date herewith, on said premises, in the form ordinarily used by Snow & Dickinson. A complete abstract of title, or merchantable copy to be furnished within a reasonable time, with a continuation thereof brought down to cover this date. In case the title, upon examination, is found materially defective, within ten days after said abstract is furnished, then, unless the material defects be cured within sixty days after written notice thereof the said earnest money shall be refunded and this contract is to become inoperative. The vendor hereby agrees to put the consideration in said deed at any sum said Bryant may desire at the time the same is made.

Should said purchaser fail to perform this contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above, shall, at the option of the vendor, be forfeited as liquidated damages, including commissions payable by vendor, and this contract shall be and become null and void. Time is the essence of this contract and of all the considerations thereof.

This contract and the said earnest money shall be held by Snow and Dickenson for the mutual benefit of the parties hereto.

In testimony whereof, said parties hereto set their hands this 23d day of August, A. D. 1890.

If this contract is recorded it is thereupon to become void, and said deposit of \$5,000 forfeited to said Jackson.

SAMUEL W. JACKSON,
GEORGE I. HICKS."

On the twenty-second of September following, the appellees gave to the appellants this paper:

"CHICAGO, ILL., Sept. 22, 1890.

In consideration that Snow & Dickenson have brought about and are now about to consummate the sale of blocks

1 to 6, both inclusive, and blocks 8 to 25, both inclusive, in Stony Island Heights Subdivision, being a subdivision made by the Calumet and Chicago Canal and Dock Company of a part of the southwest quarter of section 1, township 37 north, range 14 east of 3d principal meridian, for the sum of \$288,288, of which \$50,000 is cash, and the balance to be secured by deed of trust or mortgage on said property, we, and each of us, hereby agree to pay and deliver to said Snow & Dickenson for making said sale, of the notes representing the deferred payments of said purchase money, the following notes: One to be made by Sherburn Bryant for \$16,570, due on or before November 1, 1890, with interest, and one note made by said Bryant for \$10,000, with interest due on or before November 1, 1890.

The foregoing notes are to be delivered to Snow & Dickinson when said sale is closed, and as soon as the same are executed and delivered by said Bryant, and shall be in full for all compensation of said Snow & Dickinson, in respect to said transaction, and shall be their absolute property.

SAMUEL W. JACKSON,
SAMUEL B. FOSTER,
H. J. REYNOLDS,
W. H. PRIDMORE,
W. A. PRIDMORE,
J. W. MCFARLANE."

On the next day a deed was executed and delivered by Samuel W. Jackson to Sherburn Bryant, on the terms of the contract with Bryant, except that the times of payment were changed. The terms of the paper last copied were carried out; the appellants collected the money on the notes, and thereby received \$25,411.36 more than three per cent commission on \$288,288, the price on the sale to Bryant.

The object of this suit is to compel the appellants to pay that excess to the appellees, and the decree is for that sum, with interest in favor of the appellees. In general terms it may be said that the testimony is conflicting upon every-

thing not in writing. Upon that testimony on one side, it is argued that the paper first copied herein, was an option to the appellants, to themselves buy the property, and that on the sale to Bryant they were entitled to the difference in prices as their profit. To that it is sufficient to answer that the legal effect of a writing—what it means by express words or by implication—can not be varied by parol. *Schultz v. Plankinton Bank*, 40 Ill. App. 462.

Had the giving up to the appellants of the notes, mentioned in the paper of September 22d, been a gift by the appellees, it would have been irrevocable (8 Am. and Eng. Ency. of Law, 1339), unless the relations of the parties prevented that consequence. But it does not purport to be a gift, but payment for services already substantially rendered, under a retainer for a much smaller consideration. The appellants could not demand more than the price they had agreed upon. 1 Chitty on Cont., 60.

They were in a fiduciary relation and had no right to speculate upon the interests committed to their care, or to put themselves in a position adverse to the interests of the appellants. *Hughes v. Washington*, 72 Ill. 84.

“In any contract of purchase and sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome.” 2 Pomeroy’s Equity, 486.

On the case as thus far stated, there is no good reason why the agents should have the money of their principals.

It further appears that Bryant professed, at the time that the sale was to be closed up, that he was unable to perform on his part, and that to close the sale the appellants took one-fifth interest in the property with Bryant, but on the whole evidence it is by no means certain that the appellees were informed, before the deed from Jackson to Bryant was delivered, of this action of the appellants.

It is therefore irrelevant to discuss what the effect would have been if the appellees had been informed.

The paper of September 22, 1890, under which the appellants took the notes, makes no allusion to any new consider-

ation. The appellants can not claim any rights under what might have been, but never was, a consideration.

That the appellees availed themselves of all the benefits of the sale by receiving money upon the deferred payments, after they knew that the appellants had taken the fifth interest in the property, is true; if their interest in the property were a thing to be avoided or confirmed, rescinded or ratified, it is too late to undo what was done. But as the case is presented, the matter of who were interested in the purchase is unimportant; the sale, so far as the appellees knew, was to Bryant; they do not seek to rescind any part of the transaction with him; they have the right to stand now upon what they then had notice of.

Thus regarded, the case is that the agents have the money of their principals with no right to retain it.

The decree is affirmed.

Illinois Steel Company v. Paschke.

1. MASTER AND SERVANT—*Duty of Servant in Case of Negligent Workman.*—If an employe, out of the abundant opportunities he has had of observing a fellow-workman, had discovered that he was incompetent or negligent in the performance of his work, and thereby his safety was imperiled, it was his duty to have so informed the common master if he would continue in his employment without accepting its hazards.

2. FELLOW-SERVANTS—*Negligence and Notice to Employer.*—Where an employe sustains an injury because of the negligence and incompetency of a fellow-servant, such employe can not recover of the common master for such injury unless the master had knowledge of negligence and incompetency.

Memorandum.—Action for personal injuries. Declaration in case; plea of not guilty; verdict and judgment for plaintiff. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1898. Reversed and remanded. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

Illinois Steel Co. v. Paschke.

E. PARMALEE PRENTICE and WILLIAMS, HOLT & WHEELER,
attorneys for appellant.

APPELLEE'S BRIEF, CASE, HOGAN & CASE AND JAMES W.
DUNCAN, ATTORNEYS.

The evidence of the witnesses for the appellee, as to the general reputation of Crowley, the catcher, for slothfulness or carelessness, was clearly admissible to prove his unfitness, as tending to prove notice or knowledge on the part of the appellant as to his negligent and careless habits; and ignorance of such general reputation on the part of the master is itself negligence in a case in which proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative. *Railway Co. v. Stupak*, 123 Ind. 225; *Summersell v. Fish*, 117 Mass. 312; *Thayer v. Railway Co.*, 22 Ind. 26; *Love v. Railroad Co.*, 10 Ind. 554; *Hayden v. Manufacturing Co.*, 29 Conn. 557; *Railroad Co. v. Barber*, 5 Ohio St. 541; *McMillan v. Railway Co.*, 20 Barb. (N. Y.) 449; *Faulkner v. Railway Co.*, 49 Barb. (N. Y.) 324; *Hatt v. Nay*, 144 Mass. 186; *Grube v. Railway Co.*, 98 Mo. 330; *Hilts v. Railway Co.*, 55 Mich. 437; *Lee v. Railroad Co.*, 87 Mich. 574; *Gilman v. Railway Co.*, 10 Allen 233; *S. C.*, 13 Allen 444; *Railway Co. v. Ruby*, 38 Ind. 294; *Baulec v. Railroad Co.*, 59 N. Y. 356; *Monahan v. Worcester*, 150 Mass. 439; 7 Am. & Eng. Enc. of Law, 852; Wood on Master and Servant, 2d Ed., Sec. 420.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF
THE COURT.

The appellee was a workman for the appellant in its rolling mill, and was one of a gang of men employed in rolling and cutting heavy steel rails for railroad use. The rails were at a white heat during the time they were being subjected to the treatment in which the appellee was engaged, and were necessarily very dangerous to come in contact with.

While engaged in his work upon a rail that had reached the point where his duty required him to treat it, as he was doing, another rail which was being carried along by ma-

chinery to take the place of the one upon which appellee was engaged, struck against appellee's leg and caused the burn and injury complained of.

As stated by counsel for appellee in their brief:

"There are two counts to the declaration, the first of which alleged the common law duty incumbent on every employer, and which he can not delegate to others in such a manner as to relieve himself from the consequences of its non-performance, to furnish to his employe a reasonably safe place in which to work, and to use proper diligence to keep such place in a reasonably safe condition, and the negligence charged in the first count is merely a breach of that duty. The failure of the appellant to keep the place safe assigned to the appellee for the performance of his work, was of the very gist of the first count.

"The second count of the declaration alleged that the appellant, wholly disregarding its duty as an employer, carelessly, negligently and improperly employed a certain incompetent, inefficient and slothful man to perform the work of warning the appellee of the approach of red hot rails, which it was the duty of the appellee to straighten, as they came from a certain machine in the mill of the appellant."

In their process of manufacture, rails passed under certain treatment by a workman known as the "finishing catcher," and from him passed along in succession on narrow rollers operated by machinery running at a generally uniform rate of speed.

After the rails had left the "finishing catcher" they would come, next, to the appellee, whose duty it was, in connection with another workman, to guide them with tongs upon the straightening plate where the ends of the rails would be sawed off, which being done, and the rails sent forward to their next stage toward completion, the appellee would be ready for another rail.

It does not appear that there existed any better, safer, or more approved system or method of doing the work than that in vogue in appellant's mill.

The place where appellee was obliged to stand and walk

Illinois Steel Co. v. Paschke.

in order to do the work indicated, is that which appellee alleges it was the duty of the appellant to furnish and keep in a reasonably safe condition, and that the failure to do so rendered appellant liable.

In the very nature of things such a place can not be safe except the person occupying it exercises a most diligent regard for his surroundings. Operated machinery carrying along in an undeviating course red hot railroad iron, means peril to him who stands in the track the hot rail is traversing.

On the other hand, the very fact that the hot iron is traversing a fixed, known and unvarying course, renders proximity to it to one accustomed to work with it, a place of comparative security. Such, indeed, it had always been prior to the happening of the injury. The appellee had worked in the same place for a continuous period of four months, and had escaped injury, and he might have continued to work there for an indefinitely longer period without harm. There was nothing that occurred of an extraordinary character, at the time of the injury, in the passage of the hot rail from one point to another. It was pursuing the usual route, and the injury happened then, just as it would have happened if in the course of the moving along upon the rollers of any other one of the several hundred rails that were rolled each day, the appellee had stood in the way of its passage. The particular spot, itself, on which appellee stood when burned, was not an unsafe place to stand when no rail was coming along, but was an exceedingly dangerous one when a rail was approaching. It was safe enough at one time, and full of peril at another.

Accustomed as the appellee was to work there, he can not escape knowledge of the danger he was liable to. The danger was perfectly obvious, and the appellee can not escape notice of it.

The method of avoiding the danger, furthermore, was as well known to the appellee, as the fact that the danger existed.

So far as the place, alone, was concerned, there was a

failure to show that it was an unsuitable one for the appellee to work in, or that there was any failure or neglect on the part of appellant in relation to it.

But it is said, and the second count is framed on that theory, that the appellant in disregard of its duty as an employer, carelessly or negligently employed an incompetent, inefficient and slothful person, to warn appellee of the approach of the hot rails, and that in consequence thereof the appellee was injured.

The person referred to is shown by the testimony to be one Crowley, who acted as "finishing catcher," and worked next to appellee in the direction from which the hot rail approached appellee.

It appears that sometimes there would be some delay in sawing off the ends of the rails, owing to a more rapid cooling off of some rails than others, and that at such times there would be less time for appellee to get out of the way of the next approaching rail, and that often, but not always, on such occasions, Crowley would call out warningly to appellee, and it is contended that if he had so called out, on the particular occasion in question, no injury to appellee would have ensued.

The exact duty of Crowley as finishing catcher, as we gather from the evidence, was to receive the rails from the rolls, and watch them as they passed upon the rollers which were to convey them to the straightening plate, where the appellee worked. When one rail had so passed upon the rollers, his duty required him to again receive another rail from the rolls, and so on. It does not appear that it was any part of his duty to direct where appellee should stand in order to guide the rail from the rollers to the straightening plate, and thence to the saws, nor that it was a part of his duty to call out, or warn appellee that a rail was approaching him, although, in the exercise of laudable and natural human impulses, he might and should give a warning when he foresaw an unusual danger. The most that can be gathered from any of the testimony is that it was Crowley's custom to call out.

In this instance it does not appear that anything out of the usual course occurred either to retard or accelerate the speed of the rail that hit appellee, but it does appear that whatever it was that brought the approaching rail closer than usual to the one that had last preceded it, was the result of something that happened at the place where appellee was working, whereby the preceding rail had been delayed, and not at the point where Crowley was working.

In the natural and usual course of things, therefore, Crowley had not so good an opportunity of knowing the danger appellee was in as appellee himself had, and there is nothing to show that Crowley did in fact know of the dangerous proximity of the two rails.

If, therefore, it was the duty of Crowley to call out, as he was accustomed to do, if he saw appellee was in danger, that duty can hardly be said to have existed under the circumstances then prevailing.

It is not, however, so much a question as to what Crowley's duty was in relation to giving warning, as it is what effect did his omission to call to, or warn appellee on the occasion when the injury happened, have upon the appellant.

It is not alleged that it was the duty of appellant to provide a person who should give warning of the approach of a hot rail. The allegation of duty is, that of the employment of a "competent, active and skillful man to regulate the passage of said hot rails," etc., and the allegation of the breach of that duty was, the negligent employment of "a certain incompetent, inefficient and slothful man to perform the work of calling to the persons then and there managing and operating said machine," where appellee was at work. If we could assume that these allegations are sufficient, the proof of the negligence of the appellant fell upon the appellee, and in our opinion it is far short of what is required in such cases. The testimony is overwhelming that Crowley was an experienced and competent man in his capacity as finishing catcher. There is no proof whatever that the rail which caused the injury did not leave him in the usually safe

way. We have already stated the relations which Crowley and the appellee occupied to each other in the work being done. They had worked together in the same relative positions for four months. They were both old and experienced workmen in rolling mills, and well understood the duties each bore to the other.

If the appellee had discovered out of the abundant opportunities he had had of observing Crowley, that he was incompetent or negligent in the performance of his work, and that thereby appellee's safety was imperiled, it was his duty to have so informed the appellant if he would continue in his employment without accepting its hazards. *Stafford v. R. R. Co.*, 114 Ill. 244.

There is no proof that he gave any such information to the appellant, or that appellant had knowledge in any way that Crowley was either careless, inefficient, or slothful.

Indeed, the proof concerning Crowley's reputation in those regards, so far as appellant had knowledge of it, was just the reverse.

And it might be said of the evidence which tended to show his incompetence, inefficiency, and slothfulness, in the discharge of his duties, that it partook altogether too much of the character of gossip and jealousy, and not enough of fact and substance, to be invoked for the preservation of a verdict by a jury.

That the managing officers of the corporation had abundant reason to believe Crowley to be a competent and prudent workman, and had no knowledge whatever to the contrary, and were not negligent in employing him, must be clear to any impartial reader of the testimony in the cause.

At most the negligence, if of anybody, except appellee himself, was that of Crowley, a fellow-servant of appellee, and for his negligence the employer is not liable unless he had knowledge of Crowley's incompetency. *Stafford v. R. R. Co.*, *supra*; *U. S. R. M. Co. v. Wilder*, 116 Ill. 100.

We can discover no justification for the verdict, and the judgment based thereon will therefore be reversed and the cause remanded.

West Chicago Street Railroad Co. v. Augustus D. Groshon.

1. **WITNESSES**—*Not to be Insulted on the Stand.*—Witnesses should not be insulted when on the stand; nor should their examination be a contest of skill or nerves between a witness and a lawyer.

2. **INSTRUCTIONS**—*Respecting Principles of Law.*—In instructing the jury it is not the duty of the court to repeat the same principle of law; it is sufficient if it is stated once fairly and intelligibly to the jury.

3. **INSTRUCTIONS**—*Referring the Jury to the Declaration.*—In giving instructions to the jury, it is absurd to refer them to the declaration as to the issues in a case.

4. **INSTRUCTIONS**—*A General Rule.*—Instructions should, in a clear, concise and comprehensive manner, inform the jury as to what material facts must be found, to recover or to bar a recovery. They should never be argumentative, equivocal or unintelligible to the jury. What may be plain to a lawyer, or to a mind well trained to reason and to apply principles, may be to those not in the habit of reasoning, obscure and difficult of being understood.

5. **INSTRUCTIONS**—*Right of the Parties to Have—Not Lost, When.*—The right of a party to a plain, simple instruction upon a material point, does not depend upon the action of the court at the instance of his adversary. And that right is not lost by having asked and obtained other instructions which only, by a not very obvious train of reasoning, refers to the same material point.

Memorandum.—Action for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

WM. B. KEEP and FRANK O. LOWDEN, attorneys for appellant.

R. M. WING and S. C. STOUGH, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This action is for personal injury, and the contested question of fact is whether the appellee attempted to board a car of the appellant while it was going at ordinary speed, or

51	463
57	475
51	463
57	604
51	463
64	500
51	463
189	311

while it had stopped, or nearly so, to permit him to get upon it, as was alleged in different counts of the declaration.

It would probably have made no difference in the result—the appellee being injured and the appellant being a corporation—what instruction, short of a peremptory one to find for the defendant, was given by the court to the jury; yet error in instructions, excepted to, is usually error for which the losing party is, by law, entitled to have the verdict set aside. The appellant asked this: “The court instructs the jury, as a matter of law, that if they believe from the evidence in the case that the train of the defendant had not slackened its speed to receive the plaintiff when plaintiff attempted to get on board the car in question, then your verdict must be for the defendant.”

The court refused the instruction and the appellant excepted. For the appellee the court had instructed the jury that if they believed, “from the evidence that the plaintiff was injured through the fault and negligence of the defendant, as set forth in the declaration,” etc. Certainly the parties, so far as the action of the court went, were entitled to an equal representation to the jury of their claims. The effect of the instruction for the appellee, was that the plaintiff should recover if his declaration was proved; why should not the jury be told that he should not recover if it was not proved?

The question is not, as put in the brief of the appellee, whether the court should tell the jury that certain facts prove negligence, but whether the court should tell the jury that if the declaration is not proved, the plaintiff fails. The car could not have stopped, as alleged, in the first and second counts, unless it had first slackened speed as alleged in the third. The instruction asked and refused was the only one upon the point of slackening speed presented by either party.

To refuse it was error. An error more likely to be damaging in its effect was committed thus: A witness for the appellee had testified, “By that time the conductor had come over, and I said, ‘You better put him on the car

and take him to the drug store.' He said, 'No, carry him to the drug store, it is only a little ways.' I said, 'No, I won't do that;' so the men interfered and said, 'Put him on the car.' We put him on the car and brought him to the drug store."

On cross-examination of two conductors—witnesses for appellant—counsel for appellee said first to one of them: "Are you the man that proposed to these people that were succoring this injured man, that they carry him on their backs to the drug store, instead of bothering your train to carry him? Are you that conductor, or was it the other fellow?"

And afterward to the other: "Are you the conductor that told these young men that were assisting Groshon on the car, that they better carry him on their back to the drug store, and not delay the train?"

The court, without objection from the counsel of the appellant, should have stopped such an examination. The counsel of the appellant objected to the questions and excepted to the overruling of the objections. Witnesses should not be insulted when on the stand, nor should their examination be a contest of skill or nerves between witness and lawyer.

Both these questions assumed what there had been no testimony tending to prove. It was competent to ask these witnesses on cross-examination as to their own conduct in the transaction they were testifying of, but it should have been by questions that left the narrative to them.

There is a sneer in each question, most marked in the first: "Are you that conductor, or was it the other fellow?"

"Worth makes the man, and want of it, the fellow."

Suppose that on the street, after the trial, the witnesses meeting the questioner, one of them asks, "Are you that lawyer that asked us questions or was it the other fellow?" In this State the courts have so little control of the proceedings before them, that really no other way is left to enforce decorum toward witnesses and in the addresses to juries,

than to grant new trials for breaches of it. *Anglo-Am. P. & P. Co. v. Baier*, 31 Ill. App. 653; *Cartier v. Troy Lumber Co.*, 35 Ill. App. 449.

See especially opinion of Judge Moran in last case.

As the judgment must be reversed for the error in refusing an instruction, it will be easy on another trial to conduct it differently, and we need not go into more detail as to the one that has passed. The remarks of the Supreme Court in *McDonald v. People*, 126 Ill. 150, are as instructive in relation to trials in civil as in criminal cases. Reversed and remanded.

MR. JUSTICE GARY, OPINION ON PETITION FOR REHEARING.

There is a serious side to this petition that deserves impartial consideration. It is true that at the instance of the appellant the court did in other instructions tell the jury that to recover, the appellee "must prove his case as is alleged in the declaration," and that the court need not repeat "the same principle of law." But it is a part of the rule that the principle should have been "once fairly and intelligibly" stated to the jury—not "intelligently" as the petition quotes from *May v. Tallman*, 20 Ill. 443. Double entry book-keeping is not intelligible to very many intelligent people.

This court has heretofore expressed its sense of the absurdity of referring a jury to the declaration as to the issues in a case. *Penn Co. v. Versten*, 41 Ill. App. 345.

The appellant was entitled to an instruction which, if heeded, would instruct that a specific act done or omitted would have a specific effect, if the consequence was a matter of law. "Instructions should in a clear, concise and comprehensive manner inform the jury as to what material facts must be found, to recover or to bar a recovery. They should never be argumentative, equivocal, or unintelligible to the jury. What may be plain to a lawyer, or a mind well trained to reason and to apply principles, may be to those not in the habit of reasoning, obscure and difficult of being understood." *Moshier v. Kitchell*, 87 Ill. 18.

The reference in the original opinion to the instruction given for the appellee was wholly unnecessary, though not unnatural. The right of the appellant to a plain, simple instruction upon a material point, did not depend upon the action of the court at the instance of the appellee. And that right was not lost by having asked and obtained other instructions which only, by a not very obvious train of reasoning, referred to that material point. Rehearing denied.

Ida F. Parsons v. The People, etc.

51	467
79	120

1. *COURTS—Exercise of Discretion—Subject to Review on Appeal.*—In this State it is established that the exercise of discretion by the courts of original jurisdiction is subject to review on appeal.

2. *CONTEMPT OF COURT—Who are Liable.*—Where a corporation and its board of directors are enjoined from doing certain specified acts, a person not a director, but having knowledge of the injunction, is equally guilty of contempt for violating it.

3. *CONTEMPT—Disobeying Injunctions—Proceedings Against Persons Not in Terms Enjoined.*—The rule upon a person not in terms enjoined should not be to show cause why he should not be attached and committed to jail for contempt of court in disobeying the injunction, but should be in knowingly and willfully aiding and abetting in disobeying and violating the injunction.

4. *INJUNCTIONS—Disobedience upon the Advice of Counsel.*—Courts should hesitate before punishing as contempt an act advised by competent and reputable counsel.

Memorandum.—Contempt of court. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1893, and reversed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

PENCE & CARPENTER, solicitors for appellant.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In this State it is established that even the exercise of discretion by the courts of original jurisdiction is subject to

review on appeal. *Boyle v. Levi*, 73 Ill. 175; *Thielman v. Burg*, 73 Ill. 293, and *Misch v. McAlpine*, 78 Ill. 507, are but a few of the many cases recognizing that principle.

On the first day of March, 1893, the Superior Court, under the title of the People of the State of Illinois v. *Ida F. Parsons and Walter B. McBride*, made *inter alia* this order: "and that said *Ida F. Parsons* do stand committed to said common jail of said Cook county, for a period of twenty days for her said contempt."

From that order she appeals. Nobody else seems to care anything about the matter, as there is no appearance against her in this court. She was the treasurer of the "Woman's Columbian Laundry Company," one, probably, of the numberless enterprises in connection with the recent great exposition in Chicago, the promoters of which enterprises looked for "the potentiality of acquiring wealth beyond the dreams of *Croesus*." In a litigation which very soon sprang up among the women, the Superior Court on the 16th day of January, 1893, entered an injunction order, a part thereof being as follows:

"And it is also ordered by the court that the said Woman's Columbian Laundry Company and its board of directors be and they are, hereby ordered to desist and refrain from incurring any expenses or obligations in and about the erection of any building or buildings, and to desist and refrain from paying any money to said *Walter B. McBride* on account of his alleged contract with said company, which he claims to have had assigned to him by one *H. C. Flood*, and to desist and refrain from entering into any similar contract with said *Walter B. McBride*."

That *Ida* was not one of the board, and therefore not in terms enjoined, does not excuse her disobedience of any injunction, the existence of which she knew. *Lord Wellesley v. Earl of Mornington*, 11 Beavan, 181. But then the rule upon her should not have been, as it is, to show cause why she "should not be attached and committed to jail for contempt of court in disobeying the injunction entered in this cause." etc., but it should have been, as it was as to other parties

Parsons v. The People.

included in the rule, "in knowingly and willfully aiding and abetting * * * in disobeying and violating said injunction." Lord Wellesley v. Earl of Mornington, 11 Beavan, 180. Those two cases were for the same act, and the distinction here made was the very ground of decision. And this case shows a good reason for the distinction.

Mrs. Sallie M. Moses was president of the board, and was present, presiding when the resolution was unanimously passed directing the act for which Ida was punished. Mrs. Moses, as well as several directors, were included in the rule to show cause—showed cause—and were discharged. Had Ida been charged with aiding and abetting, then she could not consistently have been punished for the mistake of Mrs. Moses and her co-officials, unless they were also punished. No earldom would have been their shield. But there is a higher ground for reversing.

The appellant is sentenced to punishment—not to make restitution for some wrong done—nobody (unless the keeper of the jail) could be benefited by her imprisonment. The contempt—if committed—is a misdemeanor. *Beatie v. People*, 33 Ill. App. 651.

There are many acts which are crimes or not, as the intention of the doer may be. A clerk, taking the money of his principal against his known will, but in the *bona fide* belief of a right to take it, is not guilty of crime. *Ross v. Innis*, 35 Ill. 487. And it is a defense in an action for malicious prosecution that the defendant acted under the advice of a reputable attorney, to whom all material facts were known. *Ross v. Innis*, 26 Ill. 259; *Brown v. Smith*, 83 Ill. 291.

Now, it appears that at the meeting of the board at which the before mentioned resolution was passed, the Hon. James McCartney, acting as he swears, "in the honest belief that he was advising for the best interest of the company," advised the doing of the act which is charged to be a violation of the injunction, and that in his judgment it would not be a violation.

Mr. McCartney was lately attorney-general of this State; the duty by statute imposed upon him, to advise upon re-

quest, all state officers, from the governor down, as well as the legislature, upon legal or constitutional questions. Why should not this bevy of women trust to and rely upon his advice? More especially, why should this young woman—I write young, because her mother was an active director—why should this young woman—present at the meeting, hearing and believing the advice—be punished for acting on that belief, in obedience to the order of the older women—among them her own mother—who were her employers and superiors? I remember to have heard the Hon. George Manniere say, more than thirty years ago, in the Circuit Court of this county, of which he was then sole judge, that he should hesitate long before punishing as contempt, an act advised by Archibald Williams and O. H. Browning, distinguished lawyers of Quincy, in this State.

There is nothing in the case to cast doubt upon her good faith. In the absence of all evidence, the presumption should not be indulged that she knew better, and therefore that upon her should be laid the transgressions of the others, as upon a scapegoat into the wilderness.

The appellant should have been discharged, and the judgment is reversed.

MR. JUSTICE WATERMAN dissents.

Armstead v. Blickman.

1. FORMER SUIT IN BAR—*Dismissal of Bill for Want of Equity.*—Where a bill is dismissed without qualification the decree is conclusive as to all matters involved, which are decided or might have been decided.

2. FORMER SUIT IN BAR—*Dismissal of Bill—Exception.*—The only exception to the rule is where, in case of the dismissal of the bill, it is apparent on the face of the pleadings, or in the decree of the court, that there was no hearing or adjudication upon the merits.

3. FORMER SUIT IN BAR—*An Unreversed Decree.*—So long as a decree dismissing a bill stands unreversed, it makes no difference whether the cause was correctly decided or not, or what the reasons were that induced the court to dismiss the bill; it is an adjudication in bar.

Armstead v. Blickman.

Memorandum.—Assumpsit. Error to the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

JAMES A. FULLENWIDER, attorney for plaintiff in error.

DAHMS & LANGWORTHY, attorneys for the defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was sued upon her indorsement or guaranty of a certain promissory note, made by her husband, and payable to the order of A. Y. McDonald Co.

Before said suit at law was brought to trial, but while the same was pending, the plaintiff in error brought her bill in chancery in the Superior Court against the payee of the note, and the defendant in error to whom the note had been assigned, to compel the cancellation of her said indorsement on the ground of a failure in the consideration of the note and her indorsement thereof, and upon hearing upon bill and answer, her said bill was dismissed by the court for want of equity.

On the trial of the suit at law, on the note, she attempted to set up as a defense the same matters alleged in her bill in chancery, as grounds for affirmative relief, but was met with the objection that all those matters had been adjudicated in said chancery suit, and that she was estopped by her pleadings and the decree in said suit, from having those matters tried again.

From an inspection of the bill and other pleadings in the chancery suit, introduced in evidence and contained in this record, it is apparent that every question concerning the consideration of the note and its guaranty by the plaintiff in error, as well as the time of the assignment of the note to the defendant in error, was involved, and was decided, or might have been decided, in that cause.

It was, therefore, proper for the Superior Court to refuse to retry either of those issues.

The rule is well stated in the late case of *Stickney v. Goudy*, 132 Ill. 213, where the authorities are cited, and it is said: "Where a bill is dismissed without qualification, the decree is conclusive as to all matters involved, which are decided, or might have been decided."

In *Harmon v. Auditor*, 123 Ill. 122, it was held that the former judgment or decree was conclusive, not only as to questions actually and formally litigated, but was so as to all questions within the issue, whether formally litigated or not. So, also, in *Bennitt v. Mining Co.*, 119 Ill. 9. Again, in *Beloit v. Morgan*, 7 Wall. 619, the Supreme Court of the United States said, the principle extended "not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented."

The only exception to the rule is, where, in case of the dismissal of the bill, it is apparent on the face of the pleadings or in the decree of the court, that there was no hearing or adjudication upon the merits. *Freeman on Judgments*, Sec. 270; *Herman on Estoppel*, Sec. 403.

Nor, so long as the decree stands unreversed, does it make any difference whether the cause was correctly decided or not, or what the reasons were that induced the court to dismiss the bill. *Town of Lyons v. Cooledge*, 89 Ill. 539.

There was no error in admitting in evidence the pleadings and decree in the chancery suit, and in refusing to permit the plaintiff in error to again try the issues there determined, and the judgment of the Superior Court will be affirmed.

Jonas P. Magnusson v. Neander N. Cronholm, Gustaf F. Gustafson, Hedda L. Gustafson, his wife, D. H. Fidelke, August J. Johnson, Frederick H. Brammer and Lyman Baird.

1. **EXECUTION SALES—Who May Question Them.**—If a sheriff's sale on execution is irregular and voidable, but not void, none but parties to the proceeding can question it, and then only in the same case in the same court, or by appeal or writ of error.

2. **JUDGMENTS—Collateral Attack.**—Where a court, in possession of complete jurisdiction over the parties and subject-matter, enters a judgment and proceeds to execute it, such judgment is binding and conclusive against all collateral attack.

3. **JUDGMENTS—Errors Intervening After Jurisdiction Attaches.**—Errors intervening after jurisdiction attaches, and which might have affected the judgment, if urged at the proper time and in the proper forum, can not be effectively insisted upon in a collateral proceeding, whether in law or equity.

4. **JUDGMENT—Who May Attack Collaterally.**—It is a rule of universal application that where a court has jurisdiction of the parties and of the subject-matter, its judgment can not be attacked by one not a party to the proceeding.

5. **JURISDICTION—Freehold Involved.**—In order to oust the Appellate Court of its jurisdiction it is not enough that the freehold be affected by the suit, but it must be involved.

6. **FREEHOLD—When Not Involved.**—A freehold is not directly involved in a chancery proceeding to vacate a judgment and set aside a sheriff's sale made under an execution issued upon it.

Memorandum.—In chancery. Bill to set aside sheriff's sale and other relief. Error to the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

WILLIAM DAVIS and MILTON I. BECK, attorneys for plaintiff in error.

W. I. CULVER, attorney for defendants in error N. N. Cronholm and D. H. Fidelke.

JOSEPH H. FITCH, attorney for the defendant in error F. H. Brammer.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The amended bill in this cause was demurred to, and the demurrer sustained, whereupon the complainant elected to stand by his amended bill, and on motion of defendant the court dismissed the said amended bill for want of equity.

We think the demurrer was properly sustained.

The complainant was a judgment creditor of one Gustafson, by virtue of a judgment confessed in his favor by said Gustafson, in October, 1887. He was also the assignee and owner of certain other judgments recovered against Gustafson, in favor of numerous persons, in the months of March, April, May and August, 1883, the earliest one of which was recovered on March 16, 1883. All of said judgments were in full force and unsatisfied.

Such being complainant's relation to Gustafson, the latter and his wife, on September 20, 1887, made and delivered to him a quit-claim deed of certain real estate in Chicago, with the improvements thereon, which had been sold away from Gustafson on February 14, 1884, under an alias execution upon a judgment recovered against him in favor of one Hallstrom, on February 15, 1883, at which sale one Fidelke became the purchaser.

The bill as abstracted states that said quit-claim deed "was made and delivered for the purpose of enabling complainant, either in his own name or jointly with Gustafson and wife, to realize whatever interest or claims said Gustafson and wife have in said property, and out of the proceeds to pay off and satisfy the amounts of all said claims held by complainant, with a certain amount agreed upon to be retained by complainant for his trouble, and the remainder, whatever it may be, to be received by Gustafson and his wife."

From the sale under the execution on the Hallstrom judgment, the property was redeemed in the name of A. J. Johnson, the assignee of a certain judgment which had been recovered on March 8, 1883, against Gustafson in favor of one Carl Anderson, and the premises being offered for re-sale

Magnusson v. Cronholm.

by the sheriff, they were, on March 23, 1885, struck off and sold to said Johnson, and a sheriff's deed made to him, which deed was recorded April 6, 1885.

On February 1, 1884, Gustafson and wife quit-claimed all their interest in the premises to the said Fidelke, in whose name the premises were afterward, on the 14th of the same month, purchased at the sale under the Hallstrom judgment, and their deed was recorded December 11, 1885.

Johnson and Fidelke, by separate deeds, in April and July, 1885, respectively, quit-claimed the premises to one Aaron Peck, of New York, and Peck, on October 22, 1886, conveyed the premises by a special warranty deed to the defendant, F. H. Brammer, who, under such conveyances, is the present holder of the legal title, and Brammer, about the time of said conveyances to him, incumbered the property with two trust deeds to the defendant, Lyman Baird, for \$3,000, and \$1,000, respectively.

The bill includes, with others, Gustafson and his wife, as defendants, and attacks all of the conveyances aforesaid which served in any way to divest the title from Gustafson into Brammer, on the grounds of fraud practiced by the defendant, Cronholm, at whose instigation and in whose interest, it is alleged, such conveyances and all proceedings leading up to them, were procured, and charges that because of the fraud alleged against him and those defendants who co-operated with him, the liens of the judgments owned by complainant are prior to and entitled to outrank as liens, the claims of Brammer, Baird, and all persons under them, or through whom they claim.

The bill also alleges that Gustafson and wife were never divested of their right of homestead in said premises. Relief, accordingly, is prayed, and an accounting asked for against Cronholm and Brammer.

We do not pretend to state anything more than the barest epitome of what is alleged in the very lengthy amended bill.

The legal title which has thus centered in Brammer depends at the outset upon the Hallstrom judgment.

There is nothing in that judgment which on its face sug-

gests its invalidity, and for aught we can see, the sheriff's sale was conducted with regularity.

If, however, that sale were irregular and voidable, but not void, none but parties to the proceeding could question it, and then only in the same case in the same court, or by appeal or writ of error. *Swiggart v. Harber*, 4 Scam. 364; *Rigg v. Cook*, 4 Gilm. 336; *Buckmaster v. Ryder*, 12 Ill. 207; *Lane v. Bommelmann*, 17 Ill. 95; *Phillips v. Coffee*, 17 Ill. 154; *Rockwell v. Jones*, 21 Ill. 279; *Durham v. Heaton*, 28 Ill. 264; *Cook v. City of Chicago*, 57 Ill. 268; *Hobson v. Ewan*, 62 Ill. 146; *Oakes v. Williams*, 107 Ill. 154; *Shirk v. Gravel Road Co.*, 110 Ill. 661.

It is as true in equity as at law, that where a court in possession of complete jurisdiction over the parties and subject-matter enters a judgment and proceeds to execute it, such judgment is binding and conclusive against all collateral attack. Errors intervening after jurisdiction attached, which might have affected the judgment, if urged at the proper time and in the proper forum, can not be effectively insisted upon in any collateral proceeding, whether in law or equity. *St. L. & S. C. & M. Co. v. S. C. & M. Co.*, 111 Ill. 32.

It is a rule of universal application that where a court has jurisdiction of the parties and of the subject-matter, its judgment can not be attacked by one not a party to the proceeding.

The fact that the Gustafsons have quit-claimed to complainant their supposed interest in the premises for the purpose stated in the bill, as above quoted, does not alter the fact that this proceeding is a collateral attack upon the sale under the Hallstrom judgment by one not a party to it. That conveyance in no way advantaged the complainant against the objection that his attack is a collateral one. And as to whether or not the Gustafsons were divested of their homestead by the execution sale, or subsequent proceedings, is no concern of complainant. His judgments were not liens upon the homestead. *Moore v. Flynn*, 135 Ill. 74.

Legnard v. Rhodes.

It is needless to discuss any other of the numerous questions presented by the record, which a different conclusion upon the single question here decided would have rendered necessary.

A motion to dismiss the suit out of this court for want of jurisdiction on the ground that a freehold was involved, was made and reserved to the hearing.

It is not enough that the freehold be affected by the suit, but it must be involved. *Galbraith v. Plasters*, 101 Ill. 444; and see also, *Sawyer v. Moyer*, 105 Ill. 192; *Conkey v. Knight*, 104 Ill. 337; *Furnace Co. v. Vinnedge*, 106 Ill. 650; *Dobbins v. Cruger*, 106 Ill. 383.

A freehold is not, in our opinion, directly involved here. The decree of the Circuit Court will be affirmed.

Legnard v. Rhodes et al.

1. EXHIBITS—*Must be Preserved in the Bill of Exceptions*.—Exhibits offered in evidence on the trial of a suit, are not properly a part of the record, unless incorporated in a bill of exceptions.

51	477
55	272
55	381
51	477
156s	481

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

E. K. SMITH, attorney for appellant.

ELISHA WHITTLESEY, Jr., and JAMES C. McSHANE, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The questions involved upon this appeal are so largely matters of fact, that we greatly doubt if we would be at

liberty to overturn the judgment of the Circuit Court entered upon the findings and verdict of a jury, if there were no other reason for not doing so.

The special findings involving all the controverted questions of fact were submitted to the jury, and each one was found against the defendant, who is the appellant here. No instructions were offered by the appellees and none refused that were offered by the appellant.

The argument of appellant, in this court, is directed almost entirely to demonstrating that there is error in the findings of the jury, and that they are contrary to the instructions given in his own behalf.

We shall be constrained not to follow appellant's argument through the conflict of evidence. It is enough that we do not do so because it is shown by the bill of exceptions that the defendant below offered in evidence more than one hundred exhibits in writing, and the plaintiff offered several more like exhibits, and not one out of the entire number on both sides, are with the bill of exceptions, or in any way certified to us by the trial court.

A large bundle of what may be exhibits offered on the trial, has been filed in this court, but they are not entitled in any cause and are not certified by the judge below, and we are not at liberty to regard them. *Hennessy v. Metzger*, 50 Ill. App. 533.

The judgment of the Circuit Court will be affirmed.

OPINION ON REHEARING.

After the foregoing opinion had been filed motion was made that the record in the cause be restored to the condition in which it was when filed in this court, and it being made to appear that the exhibits spoken of had been detached from the record in some unauthorized manner, an order was entered in accordance with the motion. And thereupon a petition for rehearing was filed herein.

The exhibits referred to in the former opinion now appear tied together and attached by a string to the bill of exceptions, but with no additional authenticity lent to them.

Phenix Ins. Co. v. Mechanics & Traders Bldg. Ass'n.

As has been repeatedly held by this court as well as by the Supreme Court, we can not look at these exhibits. It will be presumed they justify the judgment of the court below. Stock Quotation Telegraph Co. v. Board of Trade, 144 Ill. 370; Hennessy v. Metzger, 50 Ill. App. 533; Charles v. Remick, 50 Ill. App. 534, where the earlier cases are referred to. The petition for a rehearing will therefore be denied.

**Phenix Insurance Co. of Brooklyn, New York v.
Mechanics & Traders Savings, Loan &
Building Association.**

51 479
57 106

1. EVIDENCE—*Certified Copies—Admissibility.*—A certified copy of a deed offered in evidence is properly rejected where the party offering it does not show that it is not in his power to produce the original.

2. EVIDENCE—*Offer to Make Proof.*—A bare offer to prove certain matters under a question not admissible, is not enough to make the rejection error. The evidence offered and rejected should be competent to prove the offer.

3. PRACTICE IN APPELLATE COURT—*Presumption That the Trial Court was Right.*—To overcome the presumption that the ruling of the trial court is right it must be made to appear affirmatively from the bill of exceptions that prejudicial error has been committed.

4. INSURANCE—*Provisions in the Policy Relating to Title, etc.*—A paragraph relating to "fee simple title" can not be held to apply to an insurance which was taken by a mortgagee to cover his interest only, even though the name of the mortgagor is in the policy as the insured. "The interest of the assured" as those words are used in a policy, must be taken as referring to one who takes insurance ostensibly as owner.

Memorandum.—Action on policy of insurance. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

ELBERT H. GARY, attorney for appellant.

EASTMAN & SCHUMACHER, attorneys for appellee.

VOL. 51.] Phenix Ins. Co. v. Mechanics & Traders Bldg. Ass'n.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

A policy of insurance issued by appellant to F. W. Cleaver, as would appear on the face of it, but in fact taken out by the appellee, by a paper pasted on the face of the policy before it was issued, entitled "Mortgage Clause," made the "loss, if any, payable to" the appellee.

In this loss clause is contained the following language:

"It is further agreed, that in case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest herein."

The policy contained this provision:

"If the interest of the assured in the property be other than an absolute fee simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property whether inquired about or not, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void."

And: "Persons sustaining loss or damage by fire shall, within six days, give notice in writing of said loss to the company, and, within thirty days thereafter, render a particular and specific account of such loss, signed and sworn to by them," etc., etc.

On the trial the defendant offered in evidence a certified copy of a deed from F. W. Cleaver to Mary Cleaver.

It was rightly rejected, because the appellant did not show that the original was not in the power of the appellant. Secs. 35, 36, Ch. 30, Conveyances.

In a foreclosure suit by the appellee against F. W. Cleaver, the bill alleged that Mary Cleaver had or claimed some interest in the insured property. This did not prove any interest in her. It was only an admission by the appellee that she claimed an interest—not that she had any.

With the evidence in the cause being thus as to Mary Cleaver, the counsel of the appellant asked of an insurance

agent, who was on the stand as a witness, "Did your company have a policy of insurance upon the property in question on the 25th of August, 1890, issued to Mrs. Mary Cleaver, and if so, what was done with reference to adjustment of loss and payment of insurance called for by that policy?"

Which being objected to, he made this offer:

"Now, I offer to show that this other insurance was issued by the Agricultural Insurance Company upon the property in question here to Mary Cleaver, the person named in the deed from Frederick W. Cleaver; that the loss was adjusted, the amount paid, and all the circumstances for the purpose of showing that there was other insurance upon the property issued to a person having an insurable interest therein."

This offer does not aid the appellant. The question to the witness called for parol testimony to prove matter in writing, and also to prove a transaction with one not shown to have any interest in the property. A bare offer to prove, under a question not admissible, is not enough to make the rejection error. The evidence offered and rejected should be competent to prove the matter offered.

"To overcome the presumption that the ruling of the trial court is right, it must be made to appear affirmatively from the bill of exceptions that prejudicial error was committed." Moran J., in *Gaffield v. Scott*, 33 Ill. App. 317.

It is unnecessary to pay further attention to the paragraph as to other insurance, there being no proof of any.

The paragraph relating to "fee simple title" can not be held to apply to an insurance which was taken by a mortgagee to cover his interest only, even though the name of the mortgagor is in the policy as the insured. "The interest of the assured," as those words are used in the policy, must be taken as referring to one who takes insurance, ostensibly, as owner.

The paragraph as to time in which to "render a particular and specific account of" the loss may be ambiguous; if so, the construction is to be adverse to the insurer. *Travelers, etc., v. Kelsey*, 46 Ill. App. 371.

The assured had thirty days after notice of the loss, given within six days of the loss, in which to render the account.

These views cover all the objections of the appellant, and the judgment is affirmed.

51 482
51 372

Mason v. Strong.

1. PRACTICE—*Filing Additional Pleas*.—As a general rule it is a matter within the discretion of the trial court to grant or to refuse to grant leave to file an additional plea.

2. RECORD—*Stipulation to Bill of Exceptions*.—A stipulation that the clerk of said court may incorporate the original bill of exceptions into the record is of no effect.

Memorandum.—*Assumpsit*. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

EMANUEL P. BARNETT, attorney for appellant.

APPELLEE'S BRIEF, HAMLIN, HOLLAND & BOYDEN, ATTORNEYS.

The matter of allowing new and independent pleas presenting new defenses to the action to be filed, is addressed to the judicial discretion of the trial court, and the appellate courts will not interfere with the exercise of such discretionary power without it is plain there has been an abuse of such discretion. *Fisher v. Greene*, 95 Ill. 94; *Chicago & E. I. R. R. Co. v. O'Connor*, 119 Ill. 536; *Jones v. Kenne-cott*, 83 Ill. 484; *Campbell v. Powers*, 37 Ill. App. 308; *Ricker v. Scofield*, 28 Ill. App. 32.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action upon a promissory note, by the assignee thereof. The defendant filed a plea of the general issue, afterward, when the cause was called for trial, they asked

Lindblom v. Williams.

leave to file a special, unverified plea. The court refused to allow the filing of such plea, and such refusal is assigned as error.

It was, under the circumstance, in the discretion of the court to refuse or allow the filing of such plea, and we see no reason for thinking that its discretion was improperly exercised. The case is unlike that of *Misch v. McAlpine*, 78 Ill. 507; there was in the case at bar no showing, under oath, of satisfactory reasons for the plea not having been sooner filed.

The original, as we presume, of a bill of exceptions, has been inserted in the transcript, certified by the clerk of the Circuit Court. The stipulation under which this was done is that the clerk of said court may incorporate the original bill of exceptions into the record. Such a stipulation is of no effect; a bill of exceptions is a part of the record. As sent to this court we can not regard anything it alone may show. *Harris v. Shebek*, 51 Ill. App. 382; *Rohde v. Lehman*, 50 Ill. App. 455; *Zielinski v. Remus*, 46 Ill. App. 596.

The judgment of the Circuit Court is affirmed.

Lindblom v. Williams.

51	483
68	625

1. INJUNCTION.—*What is, etc.—Assessment of Damages.*—In a pending suit it was ordered that the defendant, his agents, solicitors and attorneys, and all persons acting in his behalf, absolutely desist and refrain from prosecuting, or taking any steps toward the prosecution of a certain suit at law, etc. *It was held*, that the order was an injunction, from the granting of which an appeal lies, and disobedience of which might be punished, and that it was within Sec. 12, Ch. 69, entitled "Injunctions," providing that in all cases where an injunction is dissolved, damages may be assessed.

Memorandum.—Award of damages on dissolution of an injunction. Appeal from the Superior Court of Cook County. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

EDMUND FURTHMANN, attorney for appellant; Wm. M. JOHNSON, of counsel.

ALBERT C. BARNES, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an award of damages on the dissolution of an injunction.

The only proposition of the appellant is, "There was nothing on which to permit suggestion of, or to award damages."

A chancery case was pending in the Superior Court, entitled as above. In that suit on the 14th day of November, 1892, the following order was made :

"It is hereby ordered that the defendant, William S. Williams, his agent, solicitors and attorneys, and all persons acting in his behalf, do absolutely desist and refrain from prosecuting or taking any steps toward the prosecution of the suit at law now pending in the Circuit Court of Cook County, Illinois, wherein said Williams is plaintiff and Robert Lindblom and Nathan G. Miller are defendants, being general number 107,523, until the further order of this court."

December 28, 1892, the following order was made :

"This cause also coming on to be heard, and on the motion of defendant Williams to dissolve the injunction herein, after arguments of counsel, said motion is denied, and it is ordered that the complainant file an injunction bond in this cause in the penal sum of \$70,000, with surety, to be approved by the clerk of this court within one week."

January 6, 1893, the following order was made :

"It appearing to the court that the complainant has failed to file an injunction bond as required by the order of this court, entered herein on December 28, 1892, therefore on motion of the defendant, Williams, it is ordered that the injunction granted herein be, and the same is, hereby dis-

Morse v. Goetz.

solved, with leave to said defendant to file his suggestion of damages herein.

Now the argument is, that as no writ of injunction ever issued, no damages could be awarded.

But the order of November 14th was an injunction from the granting of which an appeal would lie, and disobedience of which would be punished.

It is within "all cases where an injunction is dissolved." Sec. 12, Ch. 69, Injunctions. When dissolved it was a case for damages.

Very delicately the appellant criticises the action of the court in not permitting him to cross-examine as to value, a witness, who had only stated the services he had rendered, and the amount he had been paid, the testimony as to value coming from other witnesses. The court was right. *McKone v. Williams*, 37 Ill. App. 591. Affirmed.

Morse v. Goetz et al.

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80	50

1. *SURETIES—On Appeal Bond—When Released.*—The substitution of a new party in a suit pending on appeal releases the surety on the appeal bond.

2. *PARTIES—Suit for the Use of Another.*—The fact that one person sues for the use of another, does not make the person for whose use the suit is brought a party to it, nor is the judgment rendered a judgment in his favor.

Memorandum.—*Scire facias* on an appeal bond. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1893, and reversed. Opinion filed February 18, 1894.

The statement of facts is contained in the opinion of the court.

STIRLEN & KING, attorneys for appellant.

ISRAEL COWEN, attorney for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment in favor of appellees and against appellant, based upon a *scire facias*.

The appellant executed, as surety, an appeal bond given by the Davis & Morse Company, on an appeal to the Circuit Court from a judgment of a justice of the peace against said company and in favor of one Louis B. Lehmann. When the appeal case came on for trial in the Circuit Court, leave of court was asked, and obtained, to change the plaintiff to John B. Goetz & Co., partners, for the use of Louis B. Lehmann, and judgment was rendered by the Circuit Court in favor of said Goetz & Co., and against the defendants, Davis & Morse Company, for the use of Lehmann.

Scire facias proceedings were thereupon begun against the appellant as surety upon said appeal bond. To the *scire facias* the appellant pleaded that he did not execute the bond to the present plaintiffs, the appellees here, and *non est factum*. The plaintiffs, appellees, demurred generally to the pleas, and the demurrer was sustained.

Thereupon the defendant, appellant, elected to stand by his pleas, and judgment was rendered against him, and he appeals to this court from that judgment.

Sec. 62, Chap. 79, Revised Statutes, prescribes the form of bond in appeal cases from judgments of justices of the peace, and section 71 of the same chapter, provides when, in whose favor, and against whom, a *scire facias* may issue.

Here was an appeal bond running to Lehmann, the plaintiff, in the justice of the peace judgment. On the trial of the appeal from that judgment, a new party plaintiff, Goetz, was substituted for Lehmann, and judgment was rendered in favor of the substituted plaintiff.

The *scire facias* was issued in the name of Goetz, the new or substituted plaintiff, and judgment was rendered in his favor against the surety on the appeal bond which ran to Lehmann.

The fact that Goetz sued for the use of Lehmann, the ob-

Toby v. Schultz.

ligée in this appeal bond, does not make the judgment one in favor of Lehmann.

"A person who is interested merely as usee is not regarded as a party to the suit." Northrop v. McGee, 20 Ill. App. 108.

It was a matter of right for the plaintiff in the original suit to substitute other parties plaintiff for himself, but having done so, the surety on the appeal bond could not be subjected to judgment by *scire facias* proceedings in favor of such substituted plaintiffs. A surety will be held only according to the letter of his obligation. Morse, as surety, entered into no obligation to Goetz. His obligation was to Lehmann alone. It might well be that he would not have consented to become surety of the defendants in a suit against them by Goetz. There could be no breach of the condition of the bond signed by Morse, without a judgment in the appeal suit in favor of Lehmann. Phillips v. Wells, 2 Sneed (34 Tenn.) 153; Seelye v. The People, 40 Ill. App. 449; Block v. Blum, 33 Ill. App. 643.

The appellant is in no way liable to the appellees on any cause of action disclosed by this record, and the judgment of the Circuit Court will therefore be reversed, without remanding the cause.

Toby v. Schultz.

1. LANDLORD AND TENANT—*Lease for Immoral Purposes—Forcible Detainer*.—The fact that a house is rented for immoral purposes is a good defense in an action to recover rent for premises so leased, but it is no defense to a proceeding in forcible detainer, which is rather in disaffirmance of any intention to devote the premises to improper purposes.

Memorandum.—Debt on appeal bond. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

SYDNEY STEIN, attorney for appellant.

CRATTY BROS. & JARVIS, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in an action upon an appeal bond given on an appeal from a judgment rendered in a forcible detainer suit. The appeal taken from the judgment in a forcible detainer proceeding was dismissed.

The defense made to the action upon the appeal bond, was that the premises, for the possession of which the judgment in the forcible detainer suit was rendered, were rented by the plaintiff in that suit for an immoral purpose. Such a defense might be a good one in an action to recover rent for premises so leased, but is no defense to a proceeding in forcible detainer, which is rather in disaffirmance of any intention to devote the premises to improper purposes.

The defense, in effect, was that the premises having been leased for a house of prostitution, such use may continue, and the owner can not regain his property, notwithstanding the tenant may refuse to pay rent and the landlord may desire to put his property to a laudable and proper use.

No errors have been assigned upon or filed with the record in this cause, and for that as well as the reasons above given, the judgment of the Circuit Court is affirmed.

Brown v. Monson.

1. INSTRUCTIONS—*Conflict of Testimony*.—In cases where the testimony is conflicting the instructions must be accurate.

2. INSTRUCTIONS—*Singling out Testimony*.—An instruction which singles out the testimony of one party and calls the attention of the jury to it, as if in the judgment of the court it was to that testimony, instead of to all the evidence in the cause, the jury should look to determine what a contract is, is erroneous.

Brown v. Monson.

Memorandum.—Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

BEAM & COOKE, attorneys for plaintiff in error.

CONSIDER H. WILLETT, attorney for defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit by the defendant in error to recover his commissions as a real estate agent in and about the sale of certain real estate in Cook county. Between his testimony and that of the plaintiff in error upon the main question of his employment and services in behalf of the sale that was made by her, there was such a conflict as demanded a careful scrutiny by the court of the instructions given to the jury, so as to avoid everything that might seem to favor the testimony of one party over that of the other.

The two parties, plaintiff and defendant, were the only witnesses who testified to the main question.

Among other instructions given to the jury by the court, on its own motion, was the following :

"In this case it is admitted that defendant has sold her property to F. C. Vehmeyer for the sum of \$18,000, and that such purchaser was introduced to the defendant by plaintiff.

If, then, you believe from a preponderance of all the evidence, that the defendant, prior to such sale, employed the plaintiff as a real estate agent or broker to sell said property, and agreed to pay him for his services in this respect $2\frac{1}{2}$ per cent upon the purchase price, substantially as testified by the plaintiff, and if you further believe from the evidence that the plaintiff, in pursuance of such employment, procured and introduced such purchaser to the defendant, the owner of said property, and that such purchaser actually bought and paid for said property, then the plaintiff would

he and is entitled to a verdict at your hands for such $2\frac{1}{2}$ per cent commission on said sum of \$18,000.

In case you believe, from a fair and impartial consideration of all the evidence, that the plaintiff has failed to establish the fact of, and the terms of his employment by the defendant by such a preponderance of the evidence, then your verdict should be for the defendant."

The vice of that instruction consists in singling out and calling to the jury's attention the testimony of the plaintiff, as if in the judgment of the court it was to that testimony, instead of to all the evidence in the cause, the jury should look to determine what the contract was.

As said in *Railway Co. v. Walsh*, 106 Ill. 253, "It singles out and calls attention to the testimony of appellee, in finding their verdict. Such a practice has long been condemned, in numerous cases in this court, as unfair, and calculated to magnify the importance of the evidence of the particular witness. * * * We must in this case, as we have in many previous cases, hold the instruction erroneous, and, in the conflict of the evidence, ground for a reversal." See also, *Wright v. Bell*, 5 Ill. App. 352.

The question of any employment by the plaintiff in error of the defendant in error as her agent to effect a sale of the premises, was a close one upon the evidence, and required the utmost fairness in its submission to the jury. Furthermore, it is a serious question, upon the record, as to whether, if the defendant in error were entitled to recover at all, he could recover more than his commissions upon the sale for \$15,000, negotiated by him, instead of upon the sale for \$18,000, effected by the plaintiff in error of the same property to the same party, and it was error to confine the jury to a consideration of the latter sum, alone, as a basis for the ascertainment of the amount of commissions, as was done by the instruction.

For the error in the instruction the judgment of the Circuit Court will be reversed and the cause remanded.

Samuel Chudleigh v. Chicago, R. I. & P. Ry. Co.

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51	491
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1. JUDGMENTS—*Collateral Attack—Fraud.*—Judgments can not be collaterally attacked for fraud in obtaining them.

2. JUDGMENTS—*How They May be Attacked.*—There are but two methods by which the judgment of a court may be attacked; these are, first, by direct attack, that is, an attempt to set it aside or correct it in some manner provided by law, and second, by collateral attack.

3. JUDGMENTS—*Direct and Collateral Attacks.*—In a direct attack the existence of the judgment is admitted, it being insisted that for some reason the judgment should be set aside or amended; in a collateral attack the insistence is that the judgment is without effect, void, or, being voidable, has been made void by the party entitled to repudiate it.

4. JUDGMENTS—*Collateral Attacks—Upon What Based.*—A collateral attack is based upon the assertion that the court for some reason lacked jurisdiction to render a valid and conclusive judgment.

5. INFANTS—*Suits by, at Common Law.*—At the common law infants were required to sue and to defend by guardian; by whom was meant not the guardian of the infant's person and estate, but either one admitted by the court for the particular suit on the infant's personal appearance, or appointed for suits in general by the king's letters patent. By the statute of Westminster, 2, C. 15, infants were authorized to sue by *prochein ami* in all actions; and this remedy was held to be cumulative, leaving it optional for suit to be brought by guardian or next friend.

6. INFANTS—*Suits by Guardian or Next Friend.*—But whether the suit be by guardian or next friend, it is only by permission of the court that the suit is permitted to be brought in the name of the infant by the person who assumes to be the guardian or next friend. Theoretically, such person is appointed by the court, and this is shown by its permitting the suit to be maintained.

7. INFANTS—*Suits by Practice.*—The practice originally was for the person intending to act as *prochein ami* to go with the infant before a judge at chambers, or for a petition to be presented in behalf of the infant, stating the nature of the action and praying that in respect of his infancy the person intended might be appointed as the *prochein ami* of such infant. This was accompanied by an affidavit on which the judge granted his *flat*, and on this a rule was drawn up by the clerk of the rules admitting the person designated to sue as the *prochein ami* of the infant. This practice has fallen into disuse, and now if the defendant appear and plead, it is then too late to question the authority of the *prochein ami*, and the recital in the suit that the infant is suing by his next friend is taken as conclusive that an order has been made.

8. INFANTS—*Knowledge of the Suit Not Necessary.*—It is not necessary that the infant should have any knowledge of the bringing of the

suit by his next friend, indeed, it may be maintained against his wish. So upon proper application the court will, as upon its own motion it may, direct an inquiry to ascertain if the suit brought is for the benefit of the infant, and if not, proceedings will be stayed.

9. *INFANTS—Suits by Next Friend—Presumptions.*—When suit is instituted in the name of an infant by his "next friend," the authority of the "next friend" so to do is presumed, because it is presumed that he was so appointed and authorized by the court.

10. *INFANTS—Bound by the Acts of His Next Friend.*—If the appointee of the court, his next friend, "played him false," the judgment is not thereby rendered void, but the defrauded plaintiff may resort to a court of equity to set aside and undo the fraudulent work and to wipe out the record, falsely obtained.

Memorandum.—Trespass on the case. Error to the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1898, and affirmed. Opinion filed November 27, 1898.

The statement of facts is contained in the opinion of the court.

ROSENTHAL & HIRSCHL, attorneys for plaintiff in error.

ROBERT MATHER and HENRY S. WALDRON, attorneys for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought suit against the defendant in error, and filed a declaration in an action of trespass on the case, setting forth certain injuries by him, plaintiff, received by and through the negligence of the defendant, for which he claimed damages to the amount of \$10,000; to this the defendant filed, among others, the following plea:

For a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says that the plaintiff being then and there a minor, by Richard Chudleigh, his father and next friend, heretofore impleaded it, the defendant, in the said Circuit Court of the said county of Cook, in the May term of the same court, in the year A. D. 1890, in a certain plea of trespass on the case, to the damage of the

plaintiff of \$1,000, for committing the very same acts and grievances in the said declarations mentioned, and such proceedings were thereupon had in that plea; that afterward in that same term, by the consideration and judgment of the same court, the plaintiff recovered against the defendant the sum of \$300 damages, as well as the costs of the plaintiff in that behalf, whereof the defendant was convicted, as by the record thereof still remaining in the same court more fully appears, which said judgment still remains in full force, and this the defendant is ready to verify by the said record. Whereupon it prays judgment if the plaintiff ought to have his aforesaid action, etc.

To this the plaintiff replied as follows :

As to the second plea, the plaintiff says *precludi non*, for that the said alleged and purported action and all proceedings therein, and the pretended judgment therein, were at all times, and are null and void, for that the same were not instituted nor prosecuted for the benefit or protection of plaintiff, but were instituted entirely by one Richard Chudleigh, pretending to be the next friend of the plaintiff, and were by him, in collusion with the defendant, instituted and prosecuted for the sole purpose and design of obtaining for himself a pecuniary consideration from the defendant, and of obtaining for the defendant an apparent or pretended judgment and release from plaintiff's cause of action, all and singular of which facts, purposes and intents were then and there well known to and shared in by the defendant, and all of which proceedings pretended to be in plaintiff's interests and the declaration in said pretended suit, and all steps and actions therein pretended to be taken in the interest of this plaintiff, were in fact prepared and filed by the defendant by its own attorney, and taken under the direction and at the instance and request of the defendant, itself, acting by its agents, officers and attorneys. And this plaintiff avers that he had at no time any knowledge or notice of the bringing of said pretended action, nor of the entry of said pretended judgment, nor of the pretended satisfaction thereof, until a long time after the date of the said pretended judgment, to wit, nine months thereafter.

And this the plaintiff says he is ready to verify.

The defendant demurred to this replication, which demurrer the court sustained, and thereon rendered judgment, to reverse which judgment the plaintiff prosecutes this suit.

The question thus presented is, whether a judgment obtained by an infant, suing by his next friend, is conclusive, or may, in an action at law, be collaterally attacked and disregarded, because of fraud and collusion between the next friend and the defendant in the obtaining of such judgment; such fraud and collusion not appearing in any way in the record of the proceeding, but being shown by evidence extrinsic thereto.

Appellant, while admitting the general principle that judgments can not be collaterally attacked for fraud in obtaining them, endeavors to establish a distinction, applicable, as he insists, to this case. The position of appellant is, that judgments may be collaterally attacked for fraud in obtaining them when the fraud is something not considered or passed upon in the rendition of the judgment.

In this State, at least, it seems to be settled that judgments can not be collaterally attacked for such reason.

In *Ambler v. Whipple*, 139 Ill. 311, an action of debt on a judgment, the defendant pleaded that the plaintiff in the suit wherein the judgment was rendered, had falsely represented that he would abandon the said suit and take no further steps therein, whereby he, the defendant, was induced not to interpose his defense; and the defendant also pleaded a discharge in bankruptcy, which, relying upon the plaintiff's promises to abandon his said suit, he alleged he was induced not to plead and set up as a defense to the plaintiff's said action, as he, the defendant, might and would have done but for the fraud and imposition practiced upon him by the plaintiff. A demurrer to these pleas was sustained. The Supreme Court also held them insufficient, and in passing upon them said: "The prevailing doctrine is, that a plea of fraud is not admissible in actions on judgments of sister States, where there was jurisdiction of the person and subject-matter, unless it can be set up in the court of the State

rendering the judgment. The judgment in such case is not void, but voidable only. The Supreme Court of the United States has also held that a plea of fraud in obtaining the judgment can not be interposed in an action thereon."

"Domestic judgments, and those standing upon the like footing, import verity, and public policy forbids their indirect and collateral contradiction or impeachment. * * * We are aware that in some of the earlier cases in this State there seems, in effect, to be a contrary holding, but the rule stated is, we think, as applicable to the courts of law, supported by the weight of authority."

The matter set up by the pleas thus held insufficient was something not considered or passed upon by the court in rendering judgment.

Why the defendant had failed to interpose a defense in that case, and especially why he had failed to plead his discharge in bankruptcy, was something which the court was in no wise called upon to consider.

It is clear that upon principle the attack made upon the judgment under consideration in the case at bar, can not prevail.

There are but two methods by which the judgment of a court may be attacked; these are, first, by direct attack, that is, an attempt to set it aside or correct it in some manner provided by law; and, second, by collateral attack.

In a direct attack, the existence of the judgment is admitted, it being insisted that for some reason the judgment should be set aside or amended; in a collateral attack the insistence is that the judgment is without effect, void, or being voidable, has been made void by the party entitled to repudiate it. *Harmon v. Moore*, 112 Ind. 221-227; *Earle v. Earle*, 91 Ind. 27-42; *Morrill v. Morrill et al.*, 20 Oregon, 96-101; *Van Vleet on Collateral Attack*, Secs. 4 to 18.

A collateral attack is based upon the assertion that the court for some reason lacked jurisdiction to render a valid and conclusive judgment.

In the present case, the plaintiff has not gone into court and by bill alleged that the judgment was obtained by fraud

and collusion, and therefore asked that it may be set aside, thus directly attacking it and seeking to have the record thereof removed; instead of this, he comes asking not to annul the record, but that it may be disregarded. Should he succeed in his undertaking, the record of the former judgment will still exist, not set aside or removed; rights might yet be acquired under it, and it might still be resorted to for the purpose of ascertaining what was thereby established. So there would be upon the records of the Circuit Court, two unreversed and unremoved judgments between the same parties for the same cause of action.

It is urged that the judgment against appellee having been obtained by fraud and collusion, it is to be treated as if it were no judgment at all; that in reality, the plaintiff has never had his day in court, was really never before the court, but merely made so to appear by the fraudulent action of the defendant.

In the action in which the judgment was rendered, suit was brought in the name of the present plaintiff by his next friend, he being then an infant.

At the common law, infants were required to sue and to defend by guardian; by whom was meant, not the guardian of the infant's person and estate, but either one admitted by the court for the particular suit on the infant's personal appearance, or appointed for suits in general by the king's letters patent. By the statute of Westminster, 2, C. 15, infants were authorized to sue by *porchein ami* in all actions; and this remedy was held to be cumulative, leaving it optional for suit to be brought by guardian or next friend. Coke Litt., 135 b, note 1; Young v. Young, Cro. Cas. 86; Goodwin v. Moore, Cro. Cas. 161.

But whether the suit be by guardian or next friend, it is only by permission of the court that the suit is permitted to be brought in the name of the infant by the person who assumes to be the guardian or next friend. Theoretically, such person is appointed by the court, and this is shown by its permitting the suit to be maintained. Miller v. Boyden, 3 Pick. 213; Com. Dig., Pleader, 2, C. 1; Archer v. Frowde, 1 Str. 304.

The next friend being, theoretically, an appointee of the court, may be removed by the court. *Guild v. Cranston*, 8 Cush. 506. And the next friend can not make a settlement except by leave of court. *Tripp v. Gifford*, 29 N. E. 208.

In *Rawlyn's Case*, 5 Coke, 53, it was assigned for error that the plaintiff was an infant and was admitted by guardian and no record thereof was made, as was used in C. B., but there was only recited in the count, "J. Rawlins, per A. B., *gardianum suum ad hoc per curiam specialiter admissus gurritus*," etc. The justices and barons *una voce* disallowed the error.

The practice originally was for the person intending to act as *prochein ami* to go with the infant before a judge at Chambers, or for a petition to be presented in behalf of the infant, stating the nature of the action and praying that in respect of his infancy the person intended might be appointed as the *prochein ami* of such infant. This was accompanied by an affidavit on which the judge granted his *fat*; and on this a rule was drawn up by the clerk of the rules admitting the person designated to sue as the *prochein ami* of the infant. 1 Tidd's Pr., 99.

This practice has fallen into disuse, and now if the defendant appear and plead, it is then too late to question the authority of the *prochein ami*, and the recital in the suit that the infant is suing by his next friend, is taken as conclusive that an order has been made. *Archer v. Frowde*, 1 Stra. 304; *Guild v. Cranston*, 8 Cush. (Mass.) 506.

It is not necessary that the infant should have any knowledge of the bringing of the suit by his next friend; indeed, it may be maintained against his wish. *Stumps v. Kelley*, 23 Ill. 140; *Pyne v. Wood*, 145 Mass. 558; *Fulton et al. v. Roosevelt*, 1 Paige, 178; *Morgan v. Thome*, 7 M. & W. 400.

If two or more suits for the same cause are instituted in behalf of an infant, at the same time, the court will institute an inquiry to determine which is most for his advantage. *Dormer v. Fortescue*, 3 Atk. 130.

So upon proper application the court will, as upon its own

motion it may, direct an inquiry to ascertain if the suit brought is for the benefit of the infant, and if not, proceedings will be stayed. *Richardson v. Miller*, Sim. 138; *Fulton v. Roosevelt*, *supra*; *Garr v. Drake*, 2 Johns. Ch. 942; *Nalden v. Hawkins*, 2 Myl. & K. 243; *Barwick v. Rackley*, *pro. ami*, 44 Ala. 215; *Tyler on Infancy*, 197.

The bringing of suit by next friend is authorized by the statutes of this State. Sec. 18, Ch. 64, R. S.

In *Morgan v. Thome*, *supra*, Parke, B., said: "The law knows of no distinction between infants of tender and of mature years; and as no special authority to sue is requisite in the case of an infant just born, so none is requisite from an infant on the eve of attaining his majority. It appears perfectly clear that every *prochein ami* is to be considered as an officer of the court, specially appointed to look after the interests of the infant, on whom the judgment in the action is consequently binding."

It follows from the foregoing that when suit is instituted in the name of an infant by his "next friend," the authority of the "next friend" so to do, is presumed, because it is presumed that he was so appointed and authorized by the court.

The plaintiff in the present case has therefore had his day in court, and if the appointee of the court, his next friend, "played him false," the judgment is not thereby rendered void, but the defrauded plaintiff may resort to a court of equity to set aside and undo the fraudulent work and to wipe out the record, falsely obtained, by which in this suit he is confronted.

The judgment of the Circuit Court sustaining the demurrer is affirmed.

Wisconsin Central Railroad Co. v. John Wieczorek.

1. RAILROADS—*Actions Against for Damages to Real Property*.—In an action for damages against a railroad company for noise, disturbance and the vibration of the ground, causing the ceilings and walls of the houses to crack and fall, by the passing of engines and loaded trains,

W. C. R. R. Co. v. Wieczorek.

and the consequent depreciation in value of the premises, evidence of a depreciation of rental value of the premises is permissible as bearing upon the true issue of whether there has occurred a depreciation in the market value of the property, although of itself it may not, for temporary causes, or for causes entirely foreign to the construction and operation of the railroad, conclusively establish any such depreciation.

2. PLEADING—*Amendments, How Made.*—Amending by alterations on the face of the pleading ought not to be permitted.

Memorandum.—Trespass on the case for damages to real property. Error to the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

H. S. BOUTELL and K. K. KNAPP, attorneys for appellant.

M. SALOMON, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD, DELIVERED THE OPINION OF THE COURT.

Defendant in error was the owner and in possession of three lots of land, situated on the south side of Rebecca street, at the southwest corner of that street and Paulina street, in Chicago, and having a frontage of seventy-two feet in width on said Rebecca street.

At the time he bought the property in 1883, two frame two-story houses stood upon the lots, one of which he occupied, in part, as a dwelling, and the rest he rented to tenants, for residence and business purposes.

It does not clearly appear when it was that the plaintiff in error acquired all the lots on the opposite or north side of Rebecca street for its railway right of way, 100 feet in width, and constructed its railway thereupon, but it was some time during the years 1885 to 1887. To facilitate the construction of said railway along and upon said right of way, all the buildings on the lots on the north side of Rebecca street were torn down or moved off, and the neighborhood to the extent of the population living on said lots

on the north side of Rebecca street, was depopulated. It appears that the lots belonging to the defendant in error were somewhat less than a hundred feet in depth, and that close to the alley bounding them on the rear or south end thereof, a large number of other railway tracks, some twenty in number, had been previously constructed and were in operation by other railroad corporations. Therefore it was that after the plaintiff in error constructed the railway complained of, the lots in question became shut in by extensive systems of railroad tracks on two sides of them, and were accessible by Rebecca street alone, except by crossing one or the other of said systems of railway tracks.

Whether the obstruction of Paulina street and other streets running north and south from Rebecca street, by the tracks of the plaintiff in error crossing the same, whereby the former means of access to and from the lots in question were interfered with and impaired, produced any special injury for which a recovery in damages could be had, need not be discussed, for the reason that no such injury is declared upon. The only injuries set forth in the declaration are noises and disturbances, and the vibration of the ground, causing the ceilings and walls of the houses to crack and fall by the passing of engines and loaded trains, and the consequent depreciation in value of the premises.

As originally filed, the declaration alleged that the railroad was constructed and operated in Rebecca street, and set forth injury by reason of "blocking the street in front of said plaintiff's real estate," in addition to the other special injuries above mentioned. From the evidence it clearly appeared that no part of the railroad was constructed within Rebecca street, and that said street was in no way "blocked" by the railroad; and on the trial leave was given to amend the declaration by inserting words fitting the true location of the construction and operation of the road upon and along property adjoining Rebecca street.

The words containing that amendment and where to be inserted in the declaration, appears in the bill of exceptions, but if in fact reduced to writing and filed in the cause, it is not made to appear.

There was no amendment made to the declaration, or leave therefor granted, upon which a recovery could be maintained for the obstruction of any other street leading to the property in question, although there was evidence tending to show that such obstruction existed. So that as the declaration stands as amended by the leave given therefor, the only question is, does the evidence warrant the sustaining of the judgment for damages resulting to the defendant in error from the noise and disturbance, and vibration of the ground, and consequent injury to the buildings, caused by the construction and operation of the railroad upon and along its private right of way north of and adjoining the north line of Rebecca street.

The plaintiff in error offered no evidence, and the cause was submitted to the jury upon the evidence introduced in behalf of the defendant in error, alone, and upon instructions given on the part of the plaintiff in error, none being offered on the part of defendant in error.

The assigned errors are confined to:

First. The admission of improper evidence on the part of plaintiff.

Second, third, fourth and fifth. Refusal by the court to instruct the jury to find the defendant not guilty; to dismiss the suit; to set aside the verdict and grant a new trial, and in rendering judgment on the verdict.

No error was assigned that the damages were excessive.

The evidence must be said to clearly establish the fact that the passing trains on the road of the plaintiff in error produced a very considerable physical disturbance to the houses in question.

Uncontradicted witnesses, and for aught we know, reliable ones, testified to facts that render such a conclusion indisputable upon this record.

One Loss, a tenant of plaintiff, who occupied a part of the corner house as a dwelling and butcher shop for about two years before the railroad was built, and for about three months after it began to be operated, testified that the running of the trains shook the house "so we could not sleep in the

night, and it was the same in the day," and that "the meat fell off the hooks because it (the house) was shaking."

Mary Moroski, another tenant, testified that the noise was so great no one could sleep in the house, and they were afraid to live there because there were so many trains passing in front and rear of the property.

Joseph Burkhart testified that he lived in one of the houses three years and nine months, and moved out about four months after the railroad was operated, because the plastering was jarred off by a passing train and nearly killed his child, lying in a cradle, and that the house shook whenever trains passed.

The condition of the property and the effect upon it produced by the construction and operation of the railroad, in the way shown by the testimony of these witnesses, was such as, under the declaration, made the subject of the extent of damage a proper subject of inquiry by the jury.

It brought the case clearly within the rules laid down in *Rigney v. City of Chicago*, 102 Ill. 64, and *Railroad Company v. Scott*, 132 Ill. 429; see, also, *Railway Co. v. Leach*, 41 Ill. App. 584.

It was made to appear by the testimony of witnesses in behalf of the plaintiff, that the renting value of the houses fell off very materially soon after the railroad was constructed, and almost entirely ceased within a few months after the road began to be operated.

It is not clear from the evidence to what extent that result was reached by the construction and operation of the road, but it is apparent that it was contributed to in some extent, by such construction and operation. Nor can it be said from the evidence how far that result was attained by noise separated from the jarring or vibration produced by passing trains.

The evidence of a depreciation of rental value of the premises was permissible, as bearing upon the true issue—whether there has occurred a depreciation in the market value of the property—although of itself it may not, for temporary causes, or for causes entirely foreign to the con-

struction and operation of the railroad, conclusively establish any such depreciation. It was, however, proper matter to go to the jury in connection with other evidence tending to show the depreciation in value claimed to have occurred. Had the defendant offered a proper instruction covering the question of the bearing of such evidence upon the real issue involved, the court would, doubtless, have given it, but no instruction bearing upon that subject was offered.

The jury answering a special question submitted to them by the court, said they did not consider, in arriving at their verdict, that the property of the plaintiff was damaged by the removal of the houses from the north side of Rebecca street. For such depopulation no action would lie, and the jury properly refused to consider it in getting at their verdict.

If there was evidence which reached the jury through the fact that witnesses included in their answers to proper questions the idea of damages to the lots because of the obstruction of Paulina street, the proper way to have removed the effect of such testimony was by motion to strike it out or exclude it from the jury, or by instruction, neither of which was done. So far as such evidence reached the jury it was in connection with evidence of other causes of injury, such as noise, jarring of the ground and shaking of the houses, and we are unable to say whether, if at all, the jury were induced to arrive at their verdict by the consideration of any but proper elements of damage.

While, as we have indicated, the answers of some of the witnesses were too broad, the questions to which the answers were given were proper, and if defendant chose not to avail itself of its right to have the unresponsive and improper testimony struck out, we will not here, for the first, undertake to remedy the omission, when to do so would necessarily wholly reverse the cause. It would be much more acceptable to us, considering the whole case as contained in the record, to sustain a judgment for a considerably less sum than that rendered, but there is, as already said, no error assigned upon which we are at liberty to reverse the cause because of excessive damages.

The judgment of the Circuit Court will therefore be affirmed.

MR. JUSTICE WATERMAN.

As the declaration was not in fact amended, the judgment should be reversed. A mere leave to amend an insufficient declaration will not warrant a recovery under it.

MR. JUSTICE GARY.

There is a technical error in this case, so purely technical that I can not believe it right to reverse on account of it.

There was leave to amend the declaration, but no actual amendment was made, nor can it be told on this record where the proposed amendments were to be placed in the original declaration. If it could they still would be no part of the declaration. *Ogden v. Town of Lake View*, 121 Ill. 423. "This court can not go out of the pleadings to ascertain the character of the cause of action." *Hart v. Tolman*, 1 Gilman, 1.

Amending even by alterations on the face of the pleadings ought not to be permitted. *Weatherford v. Fishback*, 3 Scam. 170; *Stanberry v. Moore*, 56 Ill. 472.

Regularly the pleading should be re-engrossed.

When, therefore, the motion for a new trial stated as one of the grounds that "the evidence does not sustain the declaration, but is materially variant therefrom," it stated a good reason, technically, for a new trial. But that ground was removable by, in fact, making the amendment, which it is clear the parties considered as made. For this technicality the judgment ought not to be reversed.

Armstrong v. Crilly.

1. REAL ESTATE—*Description of Premises*.—The demise of a house by a street number carries with it the premises of which the building, which is strictly the house, is the main or principal feature.

2. FORMER SUIT PENDING—*No Bar*.—A former suit pending is no bar.

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11 504
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Armstrong v. Crilly.

Memorandum.—Forcible detainer. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

CRATTY BROS. & JARVIS, attorneys for appellant.

EDWIN BURRITT SMITH and SOLON D. WILSON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer appealed by the present appellant from a justice of the peace to the Circuit Court, and the papers filed there May 24, 1893.

The appeal bond was filed with the justice. The appeal could be taken only by filing it there, or at least having the amount of the bond fixed by the justice. *Fairbank v. Streeter*, 142 Ill. 226.

And no appearance in the Circuit Court by the appellee, previous to calling the case for trial, was necessary to entitle the appellee to a trial. *Bessey v. Ruland*, 33 Ill. App. 73.

However, the appellee did enter his appearance June 8, 1893, and on the same day served notice to place the case on the short cause calendar, and it was there on call on July 5, 1893. It appeared then that forty-six other cases on that calendar, which should have had precedence of this, were put behind it, and the court directed that it be stricken from the place where it was and put below those forty-six.

It was again on call July 12, 1893, which was Wednesday. The appellant objected to the trial, relying upon a rule of the Circuit Court as follows :

“Monday of each week is set apart and assigned as the day for the trial of suits upon the short cause calendar, but any judge may postpone the call of his short cause calendar. No case shall be noticed for trial on such calendar until the same is at issue. All notice to place a cause on such calen-

dar must be filed with the clerk within two days after the service of the same, and not later than Thursday, eleven days from Monday on which the case is set for trial. The clerk shall place upon the short cause calendar of each judge the causes assigned to each judge and noticed for trial upon the short cause calendar, except in cases when a judge is presiding in the Criminal Court, in which case his causes shall be distributed equally by the clerk among the short cause calendars."

The argument of the appellant is in effect that, inasmuch as the terms of the Circuit Court begin on the third Monday of each month, the cause was not "at issue" when notice was served during the May term, for the reason that in that term neither party could push the matter to a trial; and also that the court, having been engaged all Monday trying cases on that calendar, as well as Tuesday, could not continue so to do on Wednesday. We deem it enough to state the argument without reply.

On the merits: The complaint described the premises as "the two three-story and basement stone front brick house situate and known as numbers 2414 and 2416 South Park avenue, Chicago, Illinois," while in the lease, the word was "houses," followed by "and the two two-story brick barns in rear thereof."

The complaint did not profess to give a copy of the words of the lease, and the descriptions in the complaint and the lease were, in legal effect, the same. *Carden v. Tuck*, Cro. Eliz. 89; *Riddle v. Littlefield*, 53 N. H. 513.

A great deal of authority might be cited that the demise of a house by a street number carries the premises of which the building, which is strictly the house, is the main or principal feature. The description may, as in *Patterson v. Graham*, 40 Ill. App. 399, S. C., 140 Ill. 431, confine the demise to narrower limits. A former suit pending is no bar. Nor if for non-payment of rent, as this was, is such former suit, commenced upon some other claim before statutory demand for the rent, a defense in abatement. *Steele v. Grand Trunk Ry.*, 20 Ill. App. 366. Affirmed.

Wenona Coal Co. v. Holmquist.

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1. NEGLIGENCE—*Bumping Cars*.—A coal company had at its mine a chute at which about two and one-half cars were loaded daily with coal, and when the loading of a car was completed, it was the custom in order to move it away so as to make room for another car to “bump” the next car against it. *It was held*, that such a system of bumping an empty car against a loaded one with sufficient force to throw the loaded car along, was necessarily hazardous to the workmen engaged about the loaded car, if done without warning, and should only be exercised upon special warning or under rules affording an assurance of protection.

2. FELLOW-SERVANTS—*Who Are Not*.—Where two sets of workmen were engaged in a coal yard, one whose duty it was to switch the cars from place to place, and the other to load them, it not appearing that they came into contact with one another in their employment, or that the duty of one had any but a remote connection with the other, one set working under a foreman, and the other under the directions of a shipping clerk, *it was held*, that there was not that direct co-operation and mutual influence in their line of employment, between the switchmen and the car loaders, that must exist to create the relation of fellow-servants.

Memorandum.—Action for personal injuries. In the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Declaration in case; plea not guilty; trial by jury; verdict and judgment for plaintiff; defendant appeals. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

CRATTY BROS. & JARVIS and WILLIAMS & MACLAREN, attorneys for appellant.

GEO. WILLARD and W. E. MASON, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was recovered by the appellee in an action against the appellant for injuries received by the former while at work for the latter in its coal yards.

The accident happened while appellee was in the performance of his work, standing between a coal car which it

was his duty to assist in loading with coal, and the chute through which the coal was discharged into the car. The space between the car and the chute was narrow, only wide enough to admit a man moving sideways, and the appellee had gone in there for the purpose of clearing the chute, which had become clogged with coal, by working a chain attached to the slide in the throat of the chute. While he was in there another car was switched down on the same track and collided with the car next to which appellee was standing, and appellee was badly hurt.

The defense was, and is, that the injury resulted from the carelessness of the appellee in going into the space between the car and the chute for the purpose of unclogging the chute when there was another and a usual, safe and convenient, way of accomplishing it; that the injury was caused by the fellow-servants of appellee, and, in this court, that the damages awarded are excessive.

One method of reaching the chain used for raising the slide in the chute was, by leaning over and reaching down from the top of the car being loaded, and another was, by reaching around between the car and the chute to the chain, and still another was that adopted by appellee, of going in bodily between the car and the chute, and there working the chain.

It is in evidence that the car that was being loaded was blocked and the brakes set so that it could not move, while in that condition, without the application of some extraordinary force. Left to itself it was reasonably safe for a person to adopt either method for clearing a clog in the chute and there is evidence that under some circumstances it was the easiest way, to go in between the car and the chute, as appellee did. That it was customary for workmen to adopt either method, according to their judgment of the condition of the clog, or their own ideas of convenience, and that appellant knew that such was the custom, is apparent from the evidence.

Appellee himself testified that the first time he went to do that kind of work, Marland, the boss, told him to do it

Wenona Coal Co. v. Holmquist.

in the way it was being done when the injury happened, and that he had seen the boss, himself, in there.

Marland denied having so told appellee, or having ever gone into the space between the car and the chute, but it was for the jury to say what the fact was.

The weight of the evidence establishes, we think, that the better way and the most usual one, was to reach down from the car being loaded and take hold of the chain, but it as clearly appears that the clearing of the chute was as practicable from either of the other indicated positions, and was reasonably safe under ordinary circumstances, and was resorted to whenever it was more convenient than to mount upon the car.

It is not claimed that, either by general rule of the yard, or by any special instruction, the appellee was at any time warned of the danger of going in between the car and the chute. There was no obvious danger in going there. Except for some extraneous cause operating to suddenly move the loading car, there was apparently no more danger in that position than there was from reaching down from the car and pulling the chain. It is not unreasonable to suppose that a person so reaching down might have as likely been thrown and injured by the powerful collision of another car with the one on which he was standing, as if he were in the position of the appellee at the time he was hurt. True, being on the car, a better opportunity for seeing the approach of a shunted car would exist, but there is nothing to show that such a peril was imminent.

From the usual manner of switching and shunting cars upon this side track, the appellee had no reason to anticipate the collision that occurred, and it is not claimed that he had any notice or warning of any kind of the approach of the colliding car.

We do not think that appellee was, under the circumstances, guilty of any such degree of negligence as would on that ground prevent a recovery.

Such being the employment of the appellee and his situation, what were the obligations of the appellant toward him?

It appears that on an average about two and one-half cars were loaded daily at this chute, and that when the loading of a car was completed, it was the custom, in order to move it away so as to make room for another car, to "bump" the next car against it and thus start it along.

Such a system of bumping an empty car against a loaded one with sufficient force to throw the loaded car along, was necessarily hazardous to the workmen engaged about the loaded car, if done without warning, and should only be exercised upon special warning or under rules affording an assurance of protection. In this instance it appears affirmatively that there were no rules upon the subject. Assuming that when a car had become loaded the workmen might, in the exercise of ordinary intelligence, knowing the custom to bump down against it the next car, be on the lookout for the collision to be occasioned by that car, and remove themselves to positions of safety, there is nothing in this record to show that the car about which appellee was then employed had yet received its load.

The inference is strongly to the contrary, or else it would not have been necessary to overcome the clogging of the chute so as to secure the flow of more coal into the car. The appellee had, therefore, no reason to expect at that time that any other car would be shunted down upon the car where he was at work, and, indeed, it appears that it was not intended by the men engaged in switching cars, that the approaching car should be driven upon that track and against the car in question, at that time.

The yard was crowded and in moving the cars about, the one that collided with the car being loaded, was started and left free to go upon that track and run upon it with the force that caused the accident. The evidence shows that there was a slight down grade from the point where the car was started upon the track in question to the chute, and that the force of gravity would assist a car moving in that direction.

A system that would permit such a result was, we think, very deficient in the matter of providing ordinary and nec-

essary safeguards to the lives and limbs of employes, and amply justified the charge of more than ordinary negligence against the appellant.

It was held in *C. & N. W. Ry. Co. v. Goebel*, 119 Ill. 515, that where a railway company places a loaded car upon a side track, to be there unloaded by the owners of the freight, and such owners or their servants, with the express or implied consent of the company, proceed to remove the freight, the company will have no right without special notice and warning, to run or back a train in upon the side track while such car is being unloaded; and that in such case, those engaged in unloading, although not permitted to disregard what comes within the range of their senses, may give their undivided attention to their work, and will be justified in assuming that the company will not molest them, or render their position hazardous, without such notice or warning.

The principle there held may, with propriety, be held to be applicable as between an employer and his servants.

But it is contended that the accident was due to the fault of one or more of the fellow-servants of appellee, and therefore appellant is not liable.

There were at least two sets of workmen engaged in the coal yard, one whose duty it was to switch the cars from place to place, and another set to load them, but it does not appear that they came into contact with one another in their employment, or that the duty of one had any but a remote connection with the other.

The appellee worked in the set that performed the loading, and was under a foreman named Marland, but those engaged in switching acted under the directions of Walker, a shipping clerk, who had charge of the filling of orders and selected and allotted the cars needed for the purpose.

Although it was necessary that cars should be furnished at the chute in order to provide work for those engaged in loading, there was no more co-operation between the switchmen and the loaders than if the cars had been supplied at the chute by the railway company over whose line they were to be hauled, instead of being owned and switched by the coal company.

It seems clear that there was not that direct co-operation and mutual influence in their line of employment, between the switchmen and the car loaders, that must exist to create the relation of fellow-servants, and thereby relieve the appellant.

The instructions read together, we think, fully and fairly presented the law of the case to the jury, and furnish as a whole, no ground for reversal. *Willard v. Swausen*, 126 Ill. 381.

There remains only the question of the amount of damages awarded.

Money compensation for injuries such as were received by the appellee, must in the nature of things, be an unsatisfactory standard of measurement, but it is the only one susceptible of application through the intervention of the courts.

A mere belief that more exact justice would have been accomplished by the awarding of a less sum, is insufficient to justify the reversal of a judgment.

Upon the whole record the judgment should be affirmed, and it will be so done.

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Western Stone Co. v. Whalen.

1. **ARREST OF JUDGMENT—*Defective Declaration.***—A motion in arrest of judgment upon the ground of a defective declaration, can not be sustained if there is a good count in the declaration.

2. **FELLOW-SERVANTS—*Rule of Determination.***—In order to constitute employees fellow-servants, the relation between them must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences.

3. **NEGLIGENCE—*Evidence of Reputation of Employee.***—In an action for personal injuries caused by the negligent act of an employe of the defendant, evidence of the general reputation of the employe for carefulness, prudence and skill, is admissible.

4. **EVIDENCE OF REPUTATION—*Competency of Witnesses.***—It is not necessary that witnesses speaking to reputation, should themselves be experts in the pursuit to which the reputation relates.

Western Stone Co. v. Whalen.

Memorandum.—Action for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of the facts is contained in the opinion of the court.

SCHUYLER & KREMER, attorneys for appellant.

DUNCAN & GILBERT, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant owned three canal boats and a steamboat which were employed in bringing stone along the canal from Lamont to Chicago, the steamboat towing the canal boats. The appellee was master of one of the canal boats. On the 8th day of May, 1889, the steamboat, with one of the canal boats in tow, passed by the canal boat of which appellee was master, preparatory to taking that also in tow behind the other. The appellee threw a line to the master of that boat, who fastened his end of it on his boat, and the appellee made three turns of the line around a post on his boat, and in some way, not clearly shown, his right leg was caught in the rope, brought against the post, and so injured that it was afterward necessarily amputated. For this injury this suit was brought, and the recovery had upon the theory—as counsel seem to agree—that the speed of the steamboat was excessive through the fault of its captain, and that the appellant is in fault in having an incompetent captain.

The declaration contains several counts, two of which charge incompetency of the captain. It is urged that those counts are not good, and that a motion in arrest of judgment should have been sustained. But if there be any good count in a declaration, judgment can not be arrested for bad ones. We considered the subject in *United States Rolling Stock Co. v. Chadwick*, 35 Ill. App. 474. It may deserve consideration whether if, upon the record, by answers to special questions, it appears expressly or by necessary infer-

ence, that the verdict is based only upon faulty counts, the rule would apply. It does not so appear here.

The jury did answer "yes" to the questions "was the plaintiff a co-employee with" the captain of the steamboat, and "was he associated with" that captain "and engaged in the same line of business at the time of the injury, namely, making up the tow."

These questions and answers do not bring the appellee and the captain of the canal boat into the category of fellow-servants.

As said in *Rolling Mill Co. v. Johnson*, 114 Ill. 57, as to fellow-servants "the idea is that the relations between the servants must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences."

It may be true that the appellee might have protected himself, but that question belongs to another branch of the case, that is, of due caution and care for himself. He might have refused to throw the line, as May might have abandoned his work in *Chicago & Alton R. R. v. May*, 10 Ill. 228.

That the captain of the steamboat was in authority as to making the tows, and had given previous notice that he would take the boat of the appellee, seems to be fully proved—as well as that the speed of the steamboat was governed by orders from him to the engineer communicated by signals.

The two captains were co-employees—that is, employed by the same corporation and associated in the same line of transporting stone from Lamont to Chicago. Similar, but not so close, relations exist between the president of a railway and a brakeman on it.

The appellee testified that when he threw the line he expected that, as was usual, the steamer would slow down; that when he saw her coming at such speed, he cast off the line that held his boat to the shore, and not supposing "that any man would do anything else" than stop, he threw the line; that he "didn't have any time to wait. If you wait

you would get left behind, and be sent down to the office." It is not very apparent to us how the stoppage of the steamboat at the instant that the line was thrown, or afterward, would have checked materially the speed of the canal boat to which the appellee threw the line, in time to do any good. Neither is it clear to us that if the conduct of the captain of the steamboat was careless, that the conduct of the appellee was not equally so. But these were matters for the jury to determine, and little experience is needed to foretell how they would be decided between an unfortunate individual and a presumably wealthy corporation. Yet the verdict must be respected. *Pennsylvania Co. v. Versten*, 41 Ill. App. 345; *Bernstein v. Roth*, 44 Ill. App. 226.

It may be that the captain of the steamboat having abundant opportunity for deliberation, and the appellee none, turns the scale in favor of the appellee. Whether he and the captain of the steamboat were fellow-servants is a debatable question; and if they were not, or if the captain of the steamboat was in authority, and the injury to the appellee was in consequence of the orders to the engineer of the steamboat, a case was presented for the consideration of the jury. The most contested question in the case arises upon the admission, over the objection and exception of the appellant, of testimony as to the general reputation of the captain of the steamboat, and that for carefulness, prudence and skill as a captain such reputation was bad.

There being before the jury evidence from which they were to determine whether, on the occasion when the appellee was injured, the captain was or was not careless, and if proved to have been so, the next question being whether the appellant ought to have employed him, the authorities justify the admission of evidence of the reputation. *Wood, Master and Servant*, Sec. 420; *Shearman and Redfield, Neg.*, Sec. 223; 2 *Thompson, Neg.*, p. 1053-4.

And it is not necessary that witnesses speaking to reputation should themselves be experts in the pursuit to which the reputation relates.

Whether the two counts should have averred notice to the

appellant of the captain's incompetency (2 Thompson, Neg., 1052) is not a question now. *Goldberg v. Schrager*, 37 Ill. App. 316.

No averment as to how the appellant had obtained notice would be necessary, that being simply a matter of evidence.

The abstract contains between five and six pages of instructions asked by the appellant and refused. It also contains about five pages of instructions given for the appellant, in which the law of the case was stated more favorably to the appellant than could be justified. It also contains twenty-nine special questions for the jury, eighteen of which were given; of the other eleven it is enough to say that such an answer to any one of them as the appellant might desire, would not have been inconsistent with the verdict rendered. *Wolff v. Wilson*, 46 Ill. App. 381.

To go into detail as to the instructions and questions would take too much space.

No instruction was given for the appellee except the usual useless, but innocuous one, relating to credibility of witnesses and weight of evidence. The judgment is affirmed.

51	516
54	582
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James H. Gilbert, Sheriff, v. Samuel Block, Receiver.

1. CHATTEL MORTGAGES—*Foreclosure in Equity*.—While bills to foreclose chattel mortgages may, under a proper showing, be maintained, it is not the case that every pledgee of personal property, in possession of and having power to sell the same, can at any time, his debt being due, call upon a court of equity to take possession of and sell the pledge for the purpose of, by foreclosure, satisfying the lien thereon.

2. COURTS OF EQUITY—*Functions to Act as an Agent*.—It is not one of the functions of a court of equity to supervise or carry on the business of parties between whom or about whose affairs there exists no controversy. If parties are in accord as to their respective rights, they have, as a rule, no occasion to apply to a court of equity to act as their agent in caring for their property.

3. COURTS OF EQUITY—*Foreclosure of Chattel Mortgages*.—A court of equity will not entertain a suit to foreclose a chattel mortgage where it does not appear by the bill that there was any controversy between

Gilbert v. Block.

the parties thereto, or that the complainant either needed or sought any relief as against the defendants.

4. **COURTS OF EQUITY—*Extent of Jurisdiction.***—The jurisdiction of a court of chancery does not extend to the appointment of a receiver and the taking possession of personal property, upon the mere allegation that parties have, without right, taken the possession of a part of it from its rightful owner.

5. **RECEIVER—*Effect of Appointment.***—The appointment of a person receiver of property, is in effect the issuance of a *quasi* injunction in respect to the same.

6. **TRUSTEE—*Can Not Shift his Burden on a Court of Equity.***—The fact that a person holds property in trust, does not warrant his application to a court to relieve him from his burden. It is the duty of directors, clerks, agents, employes of every kind, to discharge the duties they have undertaken, be faithful to the trust imposed on them, and they can not at will shift their burden upon the shoulders and conscience of a chancellor.

7. **TRUSTEES—*When They May Apply to a Court of Equity.***—Trustees may sometimes, when in doubt as to what the law requires of them, apply to a court of equity for instruction and guidance.

8. **RECEIVER—*Purpose of his Appointment.***—It is only when the court has jurisdiction to appoint a receiver that it may do so, and thus, by itself taking possession of property, compel parties to resort to it for leave to prosecute suits at law for the possession of or attachment of the property.

9. **PARTIES—*Rights of Persons Not Made Parties.***—Courts do not favor proceedings wherein an attempt is made to affect the rights of persons not made parties.

10. **RECEIVER—*Appointment of, a Peremptory Measure.***—The appointment of a receiver is one of the most difficult and embarrassing duties of a court of equity. It is a peremptory measure, the effect of which, temporarily, at least, is to deprive of his property a defendant in possession, before a final decree is reached determining the rights of the parties.

11. **RECEIVER—*What Must Appear to Warrant the Appointment.***—To warrant the interposition of a court of equity by the aid of a receiver it must appear that possession of the property was obtained by the defendant through fraud, or that the income from it is in danger of loss from the neglect, waste or misconduct of the defendant.

12. **RECEIVER—*Notice of Application for Appointment.***—Courts of equity are exceedingly averse to the appointment of receivers upon *ex parte* application, and it is the settled rule to require notice of the application to be given to the defendant.

Memorandum.—Bill to foreclose a chattel mortgage. Appointment of a receiver, etc. In the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the October term, 1893, and order reversed. Opinion filed January 22, 1894.

The statement of the case is contained in the opinion of the court.

MOSES, PAM & KENNEDY, attorneys for appellant.

FRANK O. LOWDEN and HAMLINE, SCOTT & LORD, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

On the 26th day of October, 1893, Emanuel Frankenthal filed his bill of complaint against Charles E. Frankenthal, Joseph Freudenthal and Henry Adler, doing business under the name of Frankenthal, Freudenthal & Co., alleging that the defendants, as partners, being indebted on the 20th day of October, 1893, to him, complainant, in the sum of \$111,382.97, for borrowed money and interest, on the day last named executed to him their promissory notes therefor, payable on demand, and to secure the same, on the 21st day of said month executed to him a chattel mortgage; that complainant immediately took possession of the property described and covered by said mortgage, and retained exclusive possession and control of the same until the 25th day of said October, "when sundry parties, without right, invaded his possession and took from him by replevin certain of said property, and still hold the same; that near midnight certain other parties took possession without right, of the remainder of the property, and still hold such possession, and complainant avers that other persons are threatening and intending, without right, to take possession of portions of the property, and deprive complainant of the security of the mortgage; that the mortgage remains due and unpaid. The complainant therefore prayed the aid of the court in the foreclosure of the mortgage, the sale of the property and the application of the proceeds toward the payment of the indebtedness for which it was alleged to be scant security, being, as alleged, of a value not exceeding \$80,000. The complainant further averred that pending said suit, the prop-

erty is in great danger of waste, deterioration and depreciation, and its continued care and custody will produce great loss and expense, and it would be for the interest of all parties that a receiver be appointed to take possession and convert the property into money to abide the event of the suit."

The bill had annexed as an exhibit thereto a copy of the chattel mortgage. The property thereby conveyed is described as the "goods and chattels situated in store occupying the basement, first, third and fifth floors of 240-242 East Monroe street; all the stock of men's furnishing goods, all fixtures, counters, shelving, sewing machines and all other machinery therein situated; all men's furnishing goods and piece goods, whether manufactured, unmanufactured or in the process of manufacture, as well as all tools therein situated. Also all merchandise and personal property belonging to or once in, and which shall hereafter be returned to said store, or which may be now in transit to said store from any of our customers; also the lease of the premises made by John V. Farwell, Jr., trustee, and Cornelia F. Woolley, to us, and running from January 1, 1893, to December 31, 1895. All merchandise on hand in original packages is excepted from this mortgage."

The mortgage provides that mortgagors may retain possession of the goods and chattels and keep and use the same until they shall make default in the payment. The mortgage contains the usual clauses of chattel mortgages on printed forms, authorizing the mortgagee to take immediate possession of the property in case of default, to pursue the same wherever it may be found, and enter any of the premises of the mortgagor, with or without force or process of law, wherever the chattels may be, or be supposed to be, and search for the same, take possession of, and remove and sell them at public auction to the highest bidder, upon ten days notice, or at private sale, or without notice, for cash, as the mortgagee may elect, and to retain all costs and charges for pursuing, searching for, taking and removing, storing and selling the chattels, and all prior liens thereon, together with the amount due and unpaid on the notes, rendering the surplus, if any, to the mortgagors.

The court, upon the day the bill was filed, made the following order: "Upon reading and filing the verified bill of the complainant, and the appearance of the defendants entered herein, and that they had due notice of the motion of the complainants for the appointment of a receiver in accordance with the prayer of the bill, on motion of complainant, it is ordered that Samuel Block be appointed receiver of so much of the property described in the mortgage, a copy of which is annexed to complainant's bill, as is covered by said mortgage, with full power to take possession of and sell the same for the best price that he can obtain."

On the second day of November, the receiver filed his petition, setting forth that for a time after his appointment, the American Savings Bank "illegally withheld possession of a portion of the goods of which he was appointed receiver, and that during said time the sheriff of Cook county, with the connivance of said bank, secured access to the premises where such goods were, for the avowed purpose of seizing such goods and removing the same under certain writs of replevin and attachments issued by the courts of Cook county, after the appointment of him, said receiver, and that said sheriff threatens to maintain his possession and prevents petitioner from taking possession. That the sheriff and his deputies are now engaged in executing said writs upon said property, and are seizing the same and refuse to recognize the right of the receiver to the same, although the sheriff and deputy sheriffs and attorneys for the plaintiffs in the attachment and replevin suits are fully informed of petitioner's right, power and authority and title to same."

The court thereupon ordered that the said James H. Gilbert, sheriff of Cook county, and his deputies and agents, be enjoined and restrained from proceeding or attempting to proceed in the levy of any writs of replevin or attachment issued in the suit, in which said Charles E. Frankenthal, Joseph Freudenthal, Henry Adler, Emanuel Frankenthal or Samuel Block are named as defendants or garnishees

Gilbert v. Block.

on any property situated in the basement of the first, third, fourth and fifth floors of numbers 240-242 East Monroe street, Chicago, and also be enjoined and restrained from interfering in any manner with said property or with the complete and full possession thereof by said receiver, and from interfering with said receiver in taking possession thereof, and from claiming or asserting any possession thereof by virtue of any execution of said writs hitherto, or by reason of any attempted levy thereof, or in any other way interfering with said property except by leave of this court. From this order the sheriff appealed.

Undoubtedly, cases may arise in which a court of equity will take jurisdiction of a suit to foreclose a chattel mortgage or of controversies that grow out of the rights acquired by the mortgagee, but we do not think that the bill in this case presents a case for the interposition of a court of equity. It is not one of the functions of a court of equity to supervise or carry on the business of parties between whom or about whose affairs there exists no controversy. If parties are in accord as to their respective rights, they have, as a rule, no occasion to apply to a court of equity to act as their agent in caring for their property.

It does not appear by the bill in this case, that there was any controversy between the parties thereto; or that the complainant either needed or sought any relief as against the defendants. The only complaint made in the bill is of the action and the threatened and feared action of persons neither named in or made parties thereto, and it is manifestly as a protection against such persons that the bill is aimed.

There is a class of bills, known as "bills of peace" and actions *quia timet*, but the complainant's case does not come within any of the grounds on account of which bills of peace or actions of *quia timet* may be maintained. Pomeroy's Eq. Jurisprudence, Sec. 246 to 258 and 1393.

Had the complainant filed this bill, making no one but himself a party thereto, asking, as he did, that because of the allegations thereof a receiver be appointed to take pos-

session of the mortgaged property, convert the same into money, and apply the proceeds to the payment of the secured debt, the court would not have granted so strange a request. *Jones v. Bank*, 17 Pac. Rep. 272-276, 277; *High on Receivers*, Sec. 17; *Baker v. Admr. of Backus*, 32 Ill. 79-95, 96.

The case is not materially changed by the fact that the mortgagors are made parties, when it does not appear that there is any dispute or question which the court is asked to settle or adjudicate upon, nor any equitable thing to which the complainant is entitled from the defendants which they are not willing and able to give.

Briefly stated, as regards the parties to this bill, it is a mere application to the court to appoint a receiver to do their business for them; to act as the salesman of their property, about which they have no dispute, and concerning their interests in which they have no controversy.

In this regard the court is asked to appoint, in respect to their interests in this property, a guardian for them.

If they were *non compos* or under disability, some court might do this, but a court of chancery is not authorized, upon the mere request of one or more parties, to take into its hands the custody and administration of their affairs; something more must be shown than that the parties believe the court to be more competent to do their business than they are themselves. *Schultz v. Jerrard*, 3 Atl. Rep. 265.

As we have already said, the bill is not aimed at—is not to obtain relief from the defendants thereto; the persons against whom the proceeding is directed are the “sundry parties,” not named, who, it is alleged, without right invaded the complainant’s possession and took from him by replevin “certain of said property and still hold the same,” and the other unnamed parties, who “are threatening and intending, without right, to take possession of other portions of the property.”

Why, instead of filing this bill, the complainant did not or may not resort to his action at law against these parties is not shown.

The jurisdiction of a court of chancery does not extend to the appointment of a receiver and the taking possession of personal property upon the mere allegation that parties have, without right, taken possession of a part of it, and others are threatening to take more of it from its rightful owner. *Mothe v. Fisk*, 8 Bissell, 493, 501.

Something more than this must be shown. It is fairly inferable from this bill, that the unnamed parties who have taken and are threatening to take possession of portions of the mortgaged property claim a right so to do, but if they did not, the case would not be one for the interposition of a court of equity. *Merchants & Manufacturers Nat. Bank v. Kent*, 43 Mich. 292.

A great number of persons in this city might truthfully allege that portions of their specified property had been stolen from them, and that other parties were planning to steal more, and the court might, upon such showing, be asked to interfere for the protection of, and to appoint a receiver of, such property, selling the same and applying the proceeds to the use of the owners thereof; the court would have no jurisdiction to so act.

By obtaining the appointment of a receiver, the complainant sought to deprive "sundry parties" of their plain legal rights. All persons who believed themselves entitled to the possession of any of this personal property, had a right to commence appropriate actions therefor, and to have suitable writs for the seizure of such property, and all persons who believed themselves entitled to remedies by attachment of or by levy upon any of this property, had an unquestionable right to proceed in a lawful manner in the courts of the country to an attachment of or a levy upon these goods.

The bill shows no ground for depriving any of these unnamed parties of their plain legal rights in this regard, and the bill also fails to show why, if such proceedings are or will be without right, the complainant has not a plain and adequate remedy at law in respect thereto.

The appointment of a person receiver of property is, in effect, the issuance of a *quasi* injunction in respect to the

same. High on Receivers, Secs. 163, 164, 165; Gravenstine's Appeal, 49 Penn. St. 310, 321.

Complainant was not entitled to an injunction forbidding interference by writs of replevin or otherwise, with his possession of this property.

It is urged that the trust relation existing between the mortgagee, who has taken possession of the mortgaged property, and the mortgagor, constitutes a basis for the jurisdiction of a court of equity.

The fact that one holds property in trust does not warrant his application to a court to relieve him from his burden, and itself do what he should. The greater portion of all personal property is in the possession of, and managed by those who are exercising a trust. It is the duty of directors, clerks, agents, employes of every kind, to discharge the duties they have undertaken, be faithful to the trust imposed on them, and they can not at will shift their burden upon the shoulders and conscience of a chancellor.

Trustees may sometimes, when in doubt as to what the law requires of them, apply to a court of equity for instruction and guidance. The bill of complaint in this case did not ask for guidance, but for an administrator.

It is true, as is urged, that notwithstanding the appointment of this receiver, parties might have applied to the court for leave to take from him by writs of replevin, or otherwise, possession of this property, and that the court might have accorded to them such right, but their right to sue out and have executed writs of replevin or attachment can not, under the allegations of this bill, be made to depend upon the discretion of a court of chancery. It is only when the court has jurisdiction to appoint a receiver that it may do so, and thus, by itself taking possession of property, compel parties to resort to it for leave to prosecute suits at law for the possession of or attachment of such property.

In the case at bar, we are not embarrassed by any questions that might have arisen from a disregard of the order appointing a receiver to take possession of this property, and an interference with his possession, followed by proceedings

Gilbert v. Block.

for contempt. The sheriff has appealed from an order forbidding him to take or assert possession, and such order, as well as the order appointing the receiver, is found to have been unwarranted.

The order of the Circuit Court enjoining and restraining appellant will be set aside. Order reversed.

MR. PRESIDING JUSTICE SHEPARD.

I am unable to concur in the opinion of the majority of the court, if thereby this court is to be committed to the doctrine that as between the parties to a chattel mortgage whose relations are amicable, the mortgagee may not resort to a court of equity for the purpose of foreclosing his mortgage, and having done so, may not be protected by the process of injunction against seizure of the property from the possession of a receiver appointed in the foreclosure suit, by third persons not parties to the bill.

MR. JUSTICE WATERMAN, OPINION ON REHEARING.

On a petition for rehearing filed in this case, there is set forth a summary of proceedings had in the court from whose order the appeal in this cause was taken, and action had, not only by appellant, but by various creditors of the mortgagor, which proceedings and action are said to have taken place subsequent to the injunction ordered by the Circuit Court, and before the judgment of this court. It is said that the judgment of this court has left these proceedings and the rights of the parties thereto "in inextricable confusion." We have no knowledge as to any of the matters thus described, save what we have learned from the summary of counsel given in the petition for a rehearing.

What the rights and remedies of the parties thereto are, we can not now say. It sometimes happens that out of litigation itself arises such conditions as warrant the interposition of a court of equity; and it may be that it is or will become necessary that a bill be filed and the chancellor be called upon to remove the confusion said by counsel to exist. See *Pomeroy's Eq. J.*, Secs. 174 and 175.

This court did not hold that a bill to foreclose a chattel

mortgage can not be maintained. The court did hold "that the bill in this cause presents no case for the interposition of a court of equity." What the character of the bill would have been, had all the persons whose interests were aimed at been, under proper allegations, parties to it, it is unnecessary to discuss.

The bill shows that October 20th, the defendants gave their promissory note to the complainant; that on the following day the defendants executed to the complainant a chattel mortgage upon a large stock of goods, and that the complainant immediately took possession of the same and remained in exclusive possession and control of the same until the 25th of October, four days, when sundry parties took from him by replevin certain of said property and still hold the same, and that near midnight certain other parties took possession without right of the remainder of the property and still hold the same, and that other persons are threatening and intending without right to take possession of portions of the property, and deprive complainant of the security of his mortgage which is due and unpaid.

The notes to secure which the mortgage was given were each dated October 20th, and were payable on demand.

The only parties to the bill were the mortgagee and the mortgagors. Upon the day the bill was filed the defendants appeared by counsel, and having had notice of the application for the appointment of a receiver, made no opposition thereto.

The bill does contain a prayer for the foreclosure of the mortgage, but it shows no proper ground for the aid of a court of equity to effect such foreclosure; on the contrary it shows that as soon as the mortgage was made, the mortgagee took complete possession, and that he has, by virtue of the mortgage, power to sell the mortgaged property at public or private sale. It fails to show that there is anything in dispute between the parties or anything which the complainant is entitled to from the defendants which they have withheld or withhold. It is not against the defendants that the bill seeks relief, but against persons not parties thereto.

While bills to foreclose chattel mortgages may, under a proper showing, be maintained, it is not the case that every pledgee of personal property, in possession of and having power to sell the same, can at any time, his debt being due, call upon a court of equity to take possession of and sell the pledge for the purpose of, by foreclosure, satisfying the lien thereon.

No complaint is made of anything done or refused by the defendants; the entire proceeding is evidently collusive between the parties thereto. By the appointment of a receiver, persons evidently well known, but whose names were not mentioned, were deprived of plain legal rights. Had the persons whose right to proceed at law against the mortgaged goods was by the receivership cut off, been made parties to the bill, they might not only have objected to the appointing of a receiver, but might have appealed from the order of appointment.

By, without their knowledge, obtaining a receiver, the complainant obviated the danger of objection and appeal.

The persons against whom the bill was aimed were deprived of an opportunity to be heard, placed at a disadvantage, their rights foreclosed by a proceeding of which they had no notice.

The first maxim in the administration of the law is "*audi alteram partem*."

Courts do not favor proceedings wherein an attempt is made to affect the rights of persons not made parties.

According to the allegations of the bill the mortgaged property, after coming into the possession of the complainant, had all been taken from him, some of it by legal process, and the remainder in other ways.

From the possession thus acquired by persons not parties to the bill, the receiver was given "full power to take" the mortgaged property and sell the same for the best price he could obtain.

Walker v. Gibson, 35 Ill. App. 49, contains an account of a proceeding like this, to affect the rights of persons not parties to the bill, by the appointment of a receiver, and

there, as here, the order of appointment was declared to be unwarranted.

We are not aware of any case in which an order appointing a receiver to take possession and sell property in the hands of persons not parties to the bill has been sustained.

The appointment of a receiver is one of the most difficult and embarrassing duties which a court of equity is called upon to perform. It is a peremptory measure, whose effect, temporarily at least, is to deprive of his property a defendant in possession, before a final decree is reached by the court, determining the rights of the parties. *Bank v. Gage*, 99 Ill. 207-209; *High on Receivers*, Sec. 3.

The same author in section 11 says:

"To warrant the interposition of a court of equity by the aid of a receiver * * * it must appear that possession of the property was obtained by the defendant through fraud, or that the income from it is in danger of loss from the neglect, waste or misconduct of the defendant;" and in section 7: "But in appointing a receiver the court goes still further, since it wrests the possession from the defendant. Receivers are appointed to take property out of the possession of defendants, not to seize goods or lands in the keeping of strangers to the proceeding.

"The bill in this case did not ask to have a receiver appointed of anything which the defendants, or any agent of theirs, had possession of; on the contrary the bill shows that the defendants had parted with all possession of the mortgaged property; the order appointing a receiver was therefore unwarranted." *High on Receivers*, Sec. 660; 2 *Jones on Morts.*, Sec. 1558; *Whitworth v. Whydon*, 2 *MacGordon* 52; *Sea Ins. Co. v. Stebbins*, 8 *Paige* (N. Y.) 565.

Courts of equity are exceedingly averse to the appointment of receivers upon *ex parte* application, and it is the settled rule to require notice of the application to be given the defendant. *Devoe v. Ithaca Ry. Co.*, 5 *Paige* 521; *Arnold v. Bright*, 41 *Mich.* 210; *High on Receivers*, Secs. 111 and 112; *Beach on Receivers*, Sec. 134.

Notice was in this case given to the defendants, from

whom nothing was to be taken, but no notice was given to the persons who were to be dispossessed. Manifestly, the parties in possession were not made parties lest they might object to what the complainant wished to have done.

Counsel ask if the complainant is not entitled to cut off by foreclosure the rights of the "sundry" parties who have levied upon or taken possession of the mortgaged goods, or to foreclose subject to such rights.

Surely the distinguished counsel would not have attempted to cut off the rights of "sundry" parties, without making them defendants to the proceeding; while if the foreclosure is to be subject to their rights, neither their actual possession or right to proceed at law, can be interfered with.

It is the case, as is stated in section 674 of High on Receivers, that a receiver has been allowed in behalf of the mortgage of chattels which have been seized under writs of attachment which were subordinate to the mortgage; but in the case in which this was done, *Crow v. Red River Co. Bank*, 52 Tex. 362, the court said: "The bank (the mortgagee) could not intervene in the attachment writs for want of jurisdiction in the County Court over its claim, and was virtually remediless unless the jurisdiction of the District Court could be invoked, and other creditors restrained from further proceedings under their attachments, until the respective rights of all the parties could be ascertained."

The complainant was not, in the case at bar, remediless, unless he was permitted to resort to a court of equity.

A decree against the defendants to his bill would have been of no practical benefit to him.

The answer of the defendants, filed sixteen days after the receiver was appointed, admitting, as it does, the allegations of the bill, and as a kind of cross-bill, asking that the complainant account for the proceeds of accounts assigned to him, does not establish that the bill presents a case showing that there is set forth in it a cause for the interposition of a court of equity, or the order appointing the receiver.

The petition for a receiver will be denied.

MR. JUSTICE GARY.

Extraordinary remedies are losing, in their indiscriminate application, their title.

Block, the receiver, has no interest in the simulated controversy appearing on this record, and no right to apply for the injunction from which this appeal is prosecuted. Beach, Receivers, S. 258; High, Receivers, S. 181; 20 Am. & Eng. Ency. of Law, 228.

He was not applying for protection in a possession he had obtained, but for the interposition of the jealous and sensitive dignity of a court of chancery, as a bar to a resort by strangers to process of law in the enforcement of their alleged legal rights, that thereby he might obtain possession.

This incapacity of a receiver has been often overlooked. We did it in Sercomb v. Catlin, 30 Ill. App. 258, and United States Ex. v. Smith, 35 Ill. App. 99, and the Supreme Court followed us in the same cases, 128 Ill. 556, and 135 Ill. 279.

Numerous cases can also be found, where the United States Circuit Courts, especially in operating insolvent railways, have exercised a paternal authority at the instance of receivers, but no calmly considered case, where the point has been made, justifies a receiver appointed only to take possession of and sell property—unless acting under some statute—in originating proceedings to make more effectual the remedy of one of the parties.

If the party neglects his interests it is no business of the receiver.

Richards v. Matson et al.

1. CHATTEL MORTGAGES—*Void, When Securing Notes Not Maturing Within Two Years.*—A chattel mortgage given to secure notes, a part of which did not mature within the statutory limit of two years, is void as to judgment creditors, who have levied upon the mortgaged chattels.

2. CHATTEL MORTGAGES—*Days of Grace.*—The extension of three days of grace beyond the day named, in a promissory note or bill of

51	530
55	265
51	530
67	557
51	530
72	398
51	530
196s	448

exchange for payment, has, either by the law merchant or statute, become a fixed and positive rule of law, and as much fixed upon and made a part of the contract between the parties as though it were written on its face.

8. **PROMISSORY NOTES—*Days of Grace.***—The note does not become due, and the maker is not in dishonor and can not be sued until the expiration of the days of grace.

4. **CHATTEL MORTGAGES—*Maturity of Debt Secured—Days of Grace.***—Where a chattel mortgage was given to secure a note, payable two years after date, such note being entitled to days of grace, it was held that the note did not mature and become payable until three days after the statutory limit of two years, within which the entire debt or obligation must mature. The mortgage was, therefore, as to the whole of the indebtedness secured by it, void as to execution creditors who had levied executions upon the property.

5. **CHATTEL MORTGAGES—*Power to Declare Entire Debt Due.***—Where a power to declare a debt due is in the mortgage and not in the notes secured by it, *it was held* to be a power conferred, in order to enable the mortgagee to take possession and make his money upon the happening of certain contingencies mentioned in the mortgage, irrespective of whether the contract had matured by its terms, or not. Whereas, the maturity referred to in the statute, is the maturity fixed by the terms of the notes, or other evidences of indebtedness, secured by the mortgage.

6. **CHATTEL MORTGAGES—*Possession Taken on Default—What is Not Sufficient.***—A mortgagee, upon default being made, requested the mortgagor, a corporation, to appoint its secretary custodian of the property pending a foreclosure, which was done, and the secretary took possession of the property, a large printing and publishing establishment. There was no visible change made by the secretary after he was appointed custodian, or by anybody else, either in the possession of the mortgaged property or in the method of conducting the business. The same signs remained on the building, and about the premises, and no new one was added; the business was continued in the name of the corporation; bills were incurred and were collected in the name of the corporation the same after as before the appointment of the custodian. Of about one hundred employes, not one, except the confidential book-keeper, was informed of any change; the same books and the same stationery were used, without mark or sign to indicate a change. *It was held* that the possession was not of the character required by law and was void as to third persons.

7. **CHATTEL MORTGAGES—*Change of Possession on Default.***—Secret assignments will not take the place of open and visible indications from which other persons may observe a change of possession.

Memorandum.—Trover. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

E. A. SHERBURNE and GILBERT E. PORTER, attorneys for appellant.

APPELLEES BRIEF, LACKNER & BUTZ, AND ASHCRAFT & GORDON, ATTORNEYS.

No legal possession was taken or retained. Thornton v. Davenport et al., 1 Scam. 296; Mumford v. Canty, 50 Ill. 374; Reese v. Mitchell, 41 Ill. 365; Ticknor v. McClelland et al., 84 Ill. 472; Thompson v. Zeck, 21 Ill. 73; Thompson v. Wilhite, 81 Ill. 356; Wood v. Loomis, 21 Ill. App. 604; Gillett v. Stoddard, 30 Ill. App. 231; Doyle v. Stevens et al., 4 Mich. 87; Wilcox v. Jackson, 4 Pac. Rep. 966; Cook v. Mann, 6 Colo. 21; McKibbin v. Martin, 64 Pa. St. 352; Claflin et al. v. Rosenberg et al., 42 Mo. 439.

The mortgage relied upon is void. Silvis v. Aultman & Co., 141 Ill. 632; Arnold v. Stock, 81 Ill. 407; Ogden v. Saunders, 12 Wheat. 298; United States v. Arredondo et al., 6 Pet. 715; United States v. Union Pac. R. R. Co., 91 U. S. 85; 1 Daniel on Negotiable Instruments, Sec. 615; Parsons on Notes and Bills, Vol. 1, 390 and 394 (1870).

Bank of Washington v. Triplett, 1 Pet. (U. S.) 25; Savings Bank v. Bates, 8 Ct. 505; Fox v. Bank of Kansas City, 30 Kans. 441; Cook v. Renick, 19 Ill. 598; Bell et al. v. First Nat. Bk. Chicago, 115 U. S. 373; Taylor v. City of New York, 82 N. Y. 18.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The questions involved herein are those between judgment creditors under executions, and chattel mortgagee.

R. R. Donnelly & Sons, a corporation, on August 20, 1889, executed its seventeen promissory notes, in various amounts, aggregating \$76,906.71, payable to the order of the appellant, in six, twelve, fifteen, sixteen, eighteen and twenty-four months after date, with interest; and on the same day, to

secure said note, it executed a chattel mortgage to appellant upon what was substantially all the property that belonged to the said corporation. The mortgage was duly acknowledged and recorded on the same day it was made, and by its terms provided that possession of the mortgaged property might remain with the mortgagor.

Richards, the appellant and mortgagee, had no pecuniary interest in the transaction, but acted solely as trustee for certain creditors for whose benefit the notes were given, and to whom the notes were assigned and delivered.

The first maturing note fell due on February 20-23, 1890, and was not paid. At that time the corporation was financially embarrassed, and its president and the holders of the notes arranged together that all the notes should be declared due, under a provision contained in the mortgage giving authority to do so upon default in the payment of any of the notes as they should mature, and that appellant, through one Moore, the secretary of the corporation, should take possession of the mortgaged chattels.

In pursuance of that arrangement, the note holders, on February 24, 1890, joined in a written communication to the mortgagee, appellant, notifying him of the default, and that because thereof, in pursuance of the provisions of the mortgage, they had declared the whole indebtedness due, and directing him to take possession, and requesting him to appoint Moore, the secretary of the corporation, as his agent, custodian of the property.

Accordingly, on the same day, that communication was, at the request of the note holders, carried by Moore to appellant, who thereupon gave orders to Moore, in writing, as follows:

“CHICAGO, Monday, February 24, 1890.

To F. E. MOORE: You are hereby authorized and directed to take possession of the property described in the within mortgage for me, the said money therein mentioned being unpaid, and I direct that you hold such possession and control for me.

JOHN T. RICHARDS, Mortgagee.”

Armed with that paper, Moore returned to the corporation's place of business, where the mortgaged chattels were all situated and in use, and where all the business of the corporation—that of a large printing and publishing house—was carried on, and, as Moore testified, “took charge there and remained in charge,” until March 5, 1890, and that on the morning of March 6, 1890, he found the sheriff in possession and was prevented from entering the place.

There was no visible change made by Moore, after he was appointed custodian, or by anybody else, either in the possession of the mortgaged property or in the method of conducting the business. The same signs remained on the building and about the premises, and no new one was added; the business was continued to be conducted in the name of the corporation; bills were incurred and were collected in the name of the corporation the same after as before Moore's appointment as custodian; of about one hundred employes, not one, except the confidential book-keeper, was informed of any change; the same books and the same stationery were used without mark or sign to indicate a change. Indeed, no visible change was made, and none was intended to be made.

It was the purpose of the note holders, and of all in their interest, that whatever was done should be kept secret, in order, as was thought, to accomplish a sale of the property under more favorable auspices and to better advantage than if it were known the corporation had failed.

Two of the principal note holders were, it is true, accustomed to go frequently to the place of business, but there was no act done there by either of them from which any one, except Moore, could know why they were present.

On March 5, 1890, two judgments by confession in favor of other creditors were recovered against the corporation, and execution issued and levied, and the sheriff took possession thereunder of all the property covered by the chattel mortgage.

Upon a creditor's bill filed upon one of said judgments, a receiver was appointed to whom all of the property levied

upon was turned over, and subsequently the receiver sold the property.

On March 8, 1890, this action of trover was begun by the chattel mortgagee against the sheriff and the execution creditors.

It was stipulated that at the time of the levy of the executions the property was in the premises of the corporation, where it had always been since the mortgage was given, and that the sheriff turned over and delivered to the receiver, all of the property on March 7, 1890.

By agreement, also, a verdict of not guilty was entered as to the sheriff.

The court instructed the jury to find the other defendants, the execution creditors, not guilty, and from the judgment entered upon the verdict this appeal is prosecuted.

The judgment was right. The mortgage was given to secure notes a part of which did not mature within the statutory limit of two years, and was therefore void as to judgment creditors, who levied upon the mortgaged chattels. *Silvis v. Aultman*, 141 Ill. 632.

It was held in *Appleton v. Parker*, 15 Gray, 173, that the sureties upon a bond conditioned for the payment by the principal of certain moneys for goods to be delivered within three months from the delivery, were discharged by the acceptance by the obligee of a note given by the principal on the date of the delivery of the goods, payable by its terms three months after its date. And the decision was placed squarely on the ground that the effect of taking a note payable at three months was, because of the additional three days of grace allowed by law, an extension of the time of payment beyond that prescribed by the bond. And the learned judge who wrote the opinion in that case, said :

“The only case to which we were referred as giving a sanction to the contrary doctrine, and holding the surety liable, in disregard of the extension of the three days of grace, is that of *Smith v. Dann*, 6 Hill, 543.”

The New York case last referred to, justified its conclusion that a guaranty by one, of a credit of three months to

be given another, was not varied by the taking of a note at three months, on the ground that guaranties, like other commercial contracts, must be construed with reference to the usages of trade, and found that according to the usages of merchants it was customary to give and take notes entitled to grace, in fulfillment of contracts to be performed within the time specified in the notes, without regard to days of grace.

But such a conclusion could not, we think, be justified, when to so hold, would, as in this case, contravene an express statute fixing the duration of the life of a chattel mortgage as against execution creditors, at two years.

Our statute concerning mortgages of personal property, provides that they shall not be valid "as against the rights and interests of any third person," unless possession of the property shall be delivered to and remain with the mortgagee, or the mortgage itself shall provide that possession of the property shall remain with the mortgagor; and then shall be valid only, when the "time shall not exceed two years," "from the time it (the mortgage) is filed for record until the *maturity* of the entire debt or obligation." Secs. 1, 2, 3, Chap. 95, R. S.

It was held in *Arnold v. Stock*, 81 Ill. 407, that a note secured by chattel mortgage did not mature until the end of the days of grace to which the note was entitled.

The extension of three days of grace beyond the day named in a promissory note or bill of exchange for payment, has, either by the law merchant or statute, become a fixed and positive rule of law, and as much fixed upon and made a part of the contract between the parties as though it were written on its face. *Ogden v. Saunders*, 12 Wheaton, 213, (p. 342); *Appleton v. Parker*, *supra*.

The note does not become due, and the maker is not in dishonor and can not be sued until the expiration of the days of grace. *Ibid.*; *Arnold v. Stock*, *supra*; 1 *Daniel on Negotiable Instruments*, Sec. 614; 1 *Parsons on Notes and Bills*, 390.

It would seem, therefore, that the last four notes, aggregating \$4,400.35, payable twenty-four months after date,

did not mature and become payable until three days after the statutory limit of two years, within which "the entire debt or obligation" must mature, and, plainly, within the ruling of *Silvis v. Aultman*, *supra*, the mortgage was therefore, as to the whole of the indebtedness secured by it, void as to execution creditors, who had levied.

That the mortgagee elected to, and did, declare the whole debt due (assuming that what he did was sufficient for that purpose), under the provisions of the mortgage, does not aid the appellant, so far as this question is concerned.

The power to declare the debt due is found in the mortgage and not in the notes. It was a power conferred in order to enable the mortgagee to take possession and make his money upon the happening of certain contingencies mentioned in the mortgage, irrespective of whether the contract had matured by its terms, or not. Whereas, the maturity referred to in the statute is the maturity fixed by the terms of the notes, or other evidences of indebtedness secured by the mortgage. *Silvis v. Aultman*, *supra*.

If, in the pursuance of the exercise of that power, and of the right, thereupon, to take possession of the mortgaged chattels and sell the same, a possession, such as the law will recognize as good against third persons, had been taken of the mortgaged property, and retained by the mortgagee, a different question would have been raised, notwithstanding the fact that the mortgage was invalid as against execution creditors who might levy without notice of such possession.

Referring back to the brief statement of the facts as to what was done by appellant in the way of taking possession of the mortgaged premises, after the indebtedness secured by the mortgage had been declared due, we fail to find sufficient to amount to such evidences of possession as the law requires.

There was no obvious change in the possession, by Moore, as custodian, from what had previously existed, in Moore as secretary.

Secret assignments will not take the place of open and visible indications from which other persons may observe a change of possession.

And, as already said, the arrangement was intended to be a secret transfer only, and it can not be sustained without a clear departure from the law long since laid down, and frequently reiterated, in this State. *Thornton v. Davenport*, 1 Scam. 296; *Mumford v. Canty*, 50 Ill. 370; *Reese v. Mitchell*, 41 Ill. 365; *Ticknor v. McClelland*, 84 Ill. 471; *Gillette v. Stoddart*, 30 Ill. App. 231.

The judgment of the Circuit Court will be affirmed.

Kaegebein v. Higgle and Friedrich.

51	538
54	319
51	588
92	1845

1. CHANCERY PRACTICE—*Objections to Master's Report*.—Where no objection to the master's report are filed with him, the question of its being sustained by the evidence is not properly presented.

2. CHANCERY PRACTICE—*No Replication Filed*.—Where a cause is heard upon the bill and a verified answer, an answer under oath not having been waived, and no replication having been filed, the answer will be taken as true, and no evidence can be received unless it be matter of record to which the answer refers.

3. CHANCERY PRACTICE—*Waiver of the Right to Have the Cause Heard upon Bill and Answer*.—Where a defendant to a cross-bill does not, in the absence of a replication to his answer, move to have the cause arising under the cross-bill set down for hearing upon the bill and answer, but allows the cause to be referred to a master, and produces evidence which is embodied in the master's report, he waives his right to object that the cause was not heard upon bill and answer.

4. COURTS OF EQUITY—*Will Retain Jurisdiction*.—A court of equity having obtained jurisdiction of a subject-matter, will proceed to do complete justice between the parties in respect to such matter, although in its progress it may adjudicate upon a matter which is cognizable at law.

5. REAL ESTATE—*Trial of Title in Equity*.—Ordinarily title to land is tried in the action of ejectment; but when the title to land comes under equitable cognizance, the court having found in whom the title and right of possession is, may, under proper pleadings, proceed to do complete justice by delivering the possession of the premises to the party entitled to it.

Memorandum.—Chancery. , Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed November 27, 1893.

Kaegebein v. Higgle.

The statement of facts is contained in the opinion of the court.

W. C. HOYER, attorney for the appellant; ALLAN C. STORY, of counsel.

E. A. SHERBURNE, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant filed in the Circuit Court, a bill against appellees to enforce an alleged parol agreement for a lease for one year of about twelve acres of land. The bill contained a prayer for an injunction restraining the landlord and one Friedrichs, to whom the premises were leased, on February 24, 1893, from hindering and interfering with complainant's possession and his crops, then being cultivated and growing upon the demised premises. An answer to the bill was filed and thereafter a cross-bill by one of the defendants, alleging that he had made preparations for cultivating the said premises, and had been interrupted therein by acts of appellant and sustained damage in consequence thereof. Appellee therefore, in said cross-bill, asked that appellant be enjoined from going upon or occupying the said premises, and from interfering with appellee's possession of the same, and from exercising any rights or control over the same, and for other and further relief.

The cause, bill and cross-bill, was referred to a master to take testimony and report his conclusions.

He reported that the allegations of the original bill were not proven, but that those of the answer thereto were proven, and also recommended that the relief prayed for in the cross-bill be granted.

Exceptions to the master's report were filed in court, but no objections thereto were filed with the master.

The cause coming on to be heard, the court overruled the exceptions to the master's report, dismissed the original bill, and upon the cross-bill enjoined the defendant thereto, the complainant in the original bill, from going upon or in

any way interfering with appellee in his possession, occupancy and enjoyment of said premises, and from disturbing the crops, etc., thereon.

From this decree the complainant in the original bill prosecutes this appeal.

It is urged that the report and conclusions of the master were unwarranted by the evidence taken before him, and should have been overruled by the court. No objections to the master's report having been filed with him, the question of its being sustained by the evidence was not presented. *Prince v. Cutler*, 69 Ill. 267, 271.

It is insisted that no replication to the answer to the cross-bill having been filed, the answer thereto must be taken as true. Where a cause is heard upon bill and a verified answer, answer under oath not having been waived, no replication having been filed, the answer is taken as true, and no evidence can be received unless it be matter of record to which the answer refers. Sec. 29, Chap. 22, R. S.; *Chambers v. Rowe*, 39 Ill. 171.

In the present case the cross-bill was not heard upon the bill and answer therein. The defendant to the cross-bill, appellant, did not, in the absence of a replication thereto, move, as he might have done if he had answered the cross-bill, to have the cause arising under the cross-bill set down for hearing upon the bill and answer; instead of this, he allowed the cause to be referred to a master, and himself went on and produced evidence which was embodied in the master's report. It is now too late for him to object that the cause was not heard upon bill and answer. *Marple et al. v. Scott et al.*, 41 Ill. 50; *Durham v. Mulkey*, 59 Ill. 91; *Jones v. Neely*, 72 Ill. 449; *Webb v. The Alton, Marine and Fire Ins. Co.*, 5 Gil. 223.

We have discussed this matter as if an answer to the cross-bill had been filed, because appellant in his brief says that the original bill was by consent of the parties treated as an answer to the cross-bill. No such consent is shown in the record, although without such answer being filed, the decree contains the recital that the cause came on to be heard "on

Kaegebein v. Higgle.

the original bill and the answer of the defendant thereto *
 * * and the cross-bill * * * and the answer * *
 * thereto, and upon evidence taken," etc.

Appellant having brought appellee into court in respect to matters and things germane to the subject of the cross-bill, the allegations of the cross-bill became a proper subject for the consideration and judgment of the court, and its decree thereon, being in pursuance of and an adjudication upon things allied and relevant to the matter of the original bill, and also in pursuance of the prayer of the cross-bill, was within the proper province of a court of equity in such cases.

A court of equity having obtained jurisdiction of a subject-matter will go on to do complete justice between the parties in respect to such matter, although in its progress it may decree on a matter that was cognizable at law. *Cathcart v. Robinson*, 5 Peters, 264, 278; *Aldrich v. Sharp*, 3 Scam. 264; *Lloyd v. Karnes*, 45 Ill. 62-71; *Sale et al. v. McLean*, 29 Arkan. 612, 619; *Cockrell v. Warner et ux.*, 14 Arkan. 346.

Courts of equity delight to do complete justice and not by halves.

Our attention has been called to what was said by the Supreme Court of this State in *Wangelin et al. v. Goe*, 50 Ill. 459. In that case the complainant having been violently put out of possession of premises, sought the aid of a court of equity to restore to him the possession he had lost. The court held that he must resort to his action at law, and that a court of equity could not, by enjoining the trespassers from acting upon a possession they already had, give to the complainant relief which the law courts were able to afford.

That was a case upon an original bill, the court having no jurisdiction of the subject-matter, except that given by such bill. In the present cause, appellant himself brought into court the subject-matter of the decree rendered; he called upon a court of equity to give him relief by affirming a lease he claimed to have, and by enjoining appellee from disturbing a possession he insisted that he was entitled to.

Having thus obtained jurisdiction of the subject-matter, it was proper for the court to go on and afford to the complainant in the cross-bill, equitable relief in pursuance of the allegations and prayer of the cross-bill, such relief being germane to the matter of the original bill.

In *Lloyd v. Karnes*, *supra*, under a cross-bill filed by a defendant to a foreclosure suit, the court awarded to the complainant in the cross-bill a decree requiring the mortgagor, complainant in the original bill, to surrender possession to the mortgagee, saying it was "but right a decree should pass requiring the surrender of the possession to him without the expense and delay of an ejectment."

Ordinarily, title to land is tried in the action of ejectment; but when the title to land comes under equitable cognizance, the court having found in whom the title and right of possession is, may, under proper pleadings, go on and do complete justice by turning over the possession of the premises to the party it has found entitled to such possession. *Ker, shaw v. Thompson et al.*, 4 Johnson's Ch. 610.

The decree of the Circuit Court is affirmed.

Gager v. Dobson.

1. INSTRUCTIONS—*Not to be Misleading.* —An instruction which tells the jury that they must find that there is a certain amount due from the defendant to the plaintiff, and that they must not guess at the same, is misleading.

Memorandum.—Assumpsit. Originally commenced in justice's court. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in that court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

JAMES A. PETERSON, attorney for appellant.

ULLMANN & HACKER, attorneys for appellee.

Chicago Anderson Pressed Brick Co. v. Rembarz.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This action, originally brought before a justice of the peace, has been successfully prosecuted by appellee in two courts. It is for wages claimed to be due.

Appellant was unfortunately, if he has any defense, absent when the case was last tried, and the testimony of appellee made a clear case, warranting the judgment of \$142. Appellant's counsel asked to have the following instructions given:

First. "The court instructs the jury, as a matter of law, that the jury must find that there is a certain amount due to Dobson from Gager, and that they must not guess at the same."

Second. "The court instructs the jury, as a matter of law, that the plaintiff can not recover for an account that is five years old prior to the commencement of this suit, except upon a new promise made thereafter. This suit was commenced April 3, 1891."

The court refused this request.

The first of these instructions might have greatly misled the jury. Jurors have many times to form an opinion as to amounts from contradictory and imperfect evidence. An instruction that they must be certain and could not guess, might have been by them understood as forbidding them to use their judgment in reaching a conclusion. Absolute certainty is seldom required in law suits.

There was no evidence upon which the second instruction could have been based.

The judgment will be affirmed.

Chicago Anderson Pressed Brick Co. v. Rembarz.

1. MASTER AND SERVANT—*Risk of the Employment.*—An employee assumes the hazards of the ordinary perils of the work in which he is engaged, provided he knew of such dangers, or by the exercise of ordinary care might have known. If the danger is one of which the employee

51	543
150	192
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58	186
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98	291

VOL. 51.] Chicago Anderson Pressed Brick Co. v. Rembarz.

has had no reasonable opportunity to learn, then it is not a peril, the risk of which he assumes.

2. **RISK OF THE EMPLOYMENT**—*Application of the Rule.*—An inexperienced employe was put to work at a clay crusher in a brick manufacturing establishment. It was a dangerous machine, and all the instructions as to its use given him by the foreman consisted in telling him to do as a fellow-workman, who had had considerable experience working at the crusher, did. When the machine clogged the experienced workman cleared it out with a short stick. The inexperienced employe in attempting to do likewise was caught in the machine and injured. *It was held* that the danger in working at the machine was one of which the employe had no reasonable opportunity to inform himself, and was not one of the risks which he assumed.

3. **SPECIAL FINDINGS**—*When Not Consistent with the General Verdict.*—In an action to recover damages for personal injuries received by an inexperienced employe put to work at a dangerous machine by the foreman of the establishment with instructions to do as a fellow workman did, the jury in connection with the general verdict made, among others, the following special findings: "Was the plaintiff exercising reasonable care for his own safety at the time he was injured? Yes. Could the plaintiff, by reasonable attention or the exercise of ordinary prudence, have known that it was dangerous to use a stick in the machine in the manner testified to by himself? Yes." *It was held*, that the special findings were not inconsistent with the general verdict. The jury may have concluded that the plaintiff was acting, when injured, in accordance with the directions of his foreman, and that if by reasonable care he might have known that it was dangerous, still he was bound, at the peril of dismissal, to obey orders.

4. **DAMAGES**—*\$10,000 Not Excessive.*—An employe in a brick manufacturing establishment was so seriously injured while obeying the instructions of the foreman in working at a dangerous machine as to necessitate amputation of an arm. *It was held* that a judgment for \$10,000 was not necessarily excessive.

Memorandum.—Action for personal injuries. Error to the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

STATEMENT OF THE CASE.

In 1889, the defendant in error was in the employ of the Chicago Anderson Pressed Brick Company. He had been at work for the company about five weeks shoveling clay, unloading clay from cars and boats. On the day of the injury he was put to work in the clay room; his work was

that of shoveling clay and material for brick into a wheelbarrow; he was then to wheel it to a crusher, dump it by the side of the crusher, then put the wheelbarrow under the crusher to receive the crushed material as it passed through; then he was to shovel the material into the crusher, and after it was ground to wheel it away to another machine, called a reducer.

The crusher consisted of two rollers, eighteen and five-eighths inches in diameter and eighteen inches wide; the rollers were surfaced with chilled cast iron teeth, and run close together to crush material.

This machine stood up from the floor so that a wheelbarrow could be put under to catch the material as it passed through. The top of the rollers stood four to four and one-half feet high, with a frame hopper around the top, open on the side where the material was shoveled in, the rollers being in plain sight of the person shoveling. The machine was run by a belt and shafting. This machine, as well as others, were in operation in the clay room, at the works of appellant.

On the morning appellee was set to work he was taken into the clay room, where he had been at work before, and was told by the foreman of the clay room to go to work; to take a wheelbarrow and wheel the dirt and put it in the crusher, and to put his wheelbarrow underneath the crusher, and when the wheelbarrow was full to take it to another grinder. That morning the material to be crushed was clay, small, broken bats, and shale.

Appellee was working with one John Rhode. The two men alternated. Rhode took a load to the crusher, ran it through and wheeled away the crushed material. Appellee followed with a wheelbarrow and did likewise. Appellee was putting in his second load, and was using a stick to poke down the material, when the stick caught between the wheels and was drawn through, and his hand also was caught and drawn into the crusher. The wheels were revolving about one revolution a second, fifty-eight revolutions a minute.

VOL. 51.] Chicago Anderson Pressed Brick Co. v. Rembarz.

As soon as possible the crusher was stopped and appellee's arm was removed; his arm was afterward amputated above the elbow. The case went to trial before a jury; a verdict of \$12,500 was rendered, and afterward \$2,500 was remitted on suggestion of the court, and judgment rendered for \$10,000.

S. M. MILLARD, attorney for plaintiff in error.

EDMUND FURTHMANN, attorney for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Upon the trial of the cause to reverse the judgment in which this writ of error is prosecuted, there was evidence tending to show that the plaintiff below, a common laborer, upon the morning he was injured, was for the first time put to work at a dangerous machine, with the direction to do as his fellow-workman, Rhode, did; that Rhode had been previously directed by appellant's foreman to use a stick to push or poke brick bats into the grasp of the crusher; that on this occasion he did so, and the plaintiff below, seeing him, did likewise, and as a consequence was injured.

It is quite true that this was, obviously, a dangerous machine, and that plaintiff below, John Rembarz, must be held to have known that if his fingers became caught between its powerful teeth, he would be seriously injured; but there is no presumption that this common laborer had knowledge or information sufficient to enable him to understand the danger of attempting to push, with a stick eight inches long, brick bats or other material into the clasp of the swiftly revolving rollers that carried these teeth. Moreover, it is asserted by him and his companion, Rhode, that he was told to do the very thing by the doing of which his injury was occasioned.

He did not willfully thrust his fingers within the grasp of these rollers, nor did he for any purpose of his own bring his hand into proximity with their teeth; what he did, was

done in an honest endeavor to serve his employer, and when working in the manner he was directed by his foreman.

The accident happened as an experienced man might well have anticipated; the stick with which Rembarz was pushing the bats into the clasp of the rollers was caught by them; his hand naturally followed the stick and was caught also; there is no presumption that an entirely inexperienced person would have foreseen such danger.

An employe assumes the hazards of the ordinary perils of the work in which he is engaged, provided he knew of such dangers, or by the exercise of ordinary care might have known. If the danger is one of which the employe has had no opportunity to learn, then it is not the risk which he assumes. Wharton on Negligence, Sec. 206; McCormick Machine Co. v. Burandt, 136 Ill. 170; Walsh v. Peet Valve Co., 110 Mass. 23.

In the present case, a common laborer was injured by this machine within fifteen minutes after he began work upon it. There had been no reasonable time within which he could have ascertained the dangers attending what he was given to do, and no explanation was given to him of such danger.

If he and his companion, Rhode, are to be believed, he went to work with the simple instruction to do as Rhode did; seeing Rhode use a stick to push the bats, he followed such example.

The jury, in connection with the general verdict, made, among others, the following special findings:

Fifth. Was it an apparently dangerous act for one seeing the cylinders or grinders in their operation, to use a stick with his hand near the wheel or cylinders while they were in operation? No.

Sixth. Was the plaintiff exercising reasonable care for his own safety at the time he was injured? Yes.

Seventh. Could the plaintiff, by reasonable attention, or the exercise of ordinary prudence, have known that it was dangerous to use a stick in the machine in the manner testified to by himself? Yes.

VOL. 51.] Chicago Anderson Pressed Brick Co. v. Rembarz.

The sixth and seventh of these are said to be inconsistent with the general verdict.

In finding that it was not apparently dangerous to use a stick near the wheels of the machine, and that the plaintiff could, by reasonable attention, or the exercise of common prudence, have known that it was dangerous to use a stick as he did, and that the plaintiff was exercising reasonable care for his own safety at the time he was injured, and a general verdict against the defendant, the jury may have concluded that the plaintiff was acting, when injured, in accordance with the directions of his foreman, and that if, by reasonable care, he might have known that it was dangerous, still he was bound, at the peril of dismissal, to obey orders, and while he might have ascertained that his use of the stick was dangerous, yet that he did not have, in the fifteen minutes allowed to him, time in which to become aware of the danger.

Most employments about powerful machinery are dangerous, and may easily be seen to be so; but the danger, the extent and nature of it, may only be learned from extended experience.

The jury did not find that the plaintiff below could, by reasonable care, have known the danger of using a stick as he did, but merely that he could, by such care, have learned that it was dangerous.

The verdict was and the judgment is for a large sum, but not so large as to shock our sense of remedial justice.

The judgment is the act of the judge of the court before whom the cause was tried, and there is more than the usual evidence of a careful consideration of the sum for which judgment should be rendered, as the court below did not enter judgment for the entire amount of the verdict.

We do not mean to be understood as saying that if sitting as the trial court, we should have entered judgment for so large a sum, but we do not feel warranted in interfering with the conclusions of the trial court, and its judgment is affirmed.

Johnston v. Brown.

Johnston v. Brown.

1. PRACTICE—*Mere Irregularities—Time to Object.*—The rule in cases of a mere irregularity requires the party to move at the first opportunity, or show an excuse for not doing so.

2. SHORT CAUSE CALENDAR—*Practice—Waiver of Irregularities.*—Irregularities in serving a notice to place a cause on the short cause calendar must be taken advantage of at the earliest opportunity, unless an excuse for not doing so can be shown.

3. ATTORNEYS AT LAW—*Retainer.*—An express and formal retainer is not necessary. The contract of retainer may be made like any other contract expressed or implied.

Memorandum.—Forcible detainer. Appeal from the County Court of Cook County; the Hon. C. H. DONNELLY, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

APPELLANT'S BRIEF, GEO. G. BELLOW, ATTORNEY.

Notice must be served on defendant or his attorney. One who appears as attorney in the court below, is not the attorney in the upper court to which cause may be taken, until he is retained as such, and paid his retainer. *De Wolf v. Strader et al.*, 26 Ill. 23; *Covill v. Phy*, 24 Ill. 37.

APPELLEE'S BRIEF, EASTMAN & SCHUMACHER, ATTORNEYS.

By appearing and pleading or by offering evidence in the trial, a defendant waives all defects in service of process or want of process. *Filkins v. Byrne*, 72 Ill. 101; *Fondillie v. Monroe*, 14 Ill. 126.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant, in his brief, states the facts of this cause, as follows:

"This was an action in forcible detainer, brought by appellee against appellant, in a justice court, for possession of

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premises 361 N. Clark street, Chicago, on the ground that appellant's lease had expired; and that was the sole ground. Judgment was rendered in favor of appellee, for possession, from which judgment an appeal was taken to the County Court, Cook County, Illinois, on the first day of June, 1893, and before the filing of the transcript in the County Court of the proceedings before the justice, which filing was on June 2, 1893, a notice was served on the attorney who appeared in the justice court, of the placing of said cause on short cause calendar. Said attorney refusing to accept notice, it was left.

At the time of leaving such notice, said attorney had not been retained to appear in the County Court; nor was any notice served on appellant; nor had transcript been filed. After service of such notice, motion was filed, based on said affidavits, to strike cause from the short cause calendar. Motion was heard on the day cause was heard, and refused; to which exception was taken; court saying that the attorney had appeared after June 2, 1893, several times in relation to justification of sureties.

Cause called. Jury impaneled. Appellant renews his motion on grounds before mentioned, which was refused. Exception taken and appellant forced to trial." And then states his contentions, as follows:

"It is contended that the action of the court was irregular; first, because the transcript was not filed June 1, 1893, at the time of leaving notice, and not until June 2, 1893; and that proceedings could not be taken until the filing of such transcript; that notice was premature; affidavit and notice being filed, with clerk, on June 2, 1893," and notice stating that "On the second day of June, 1893, affidavit, of which foregoing is a copy, was duly filed," etc.

Whatever irregularity there was in serving the notice to place the appeal on the short cause calendar before the transcript was filed, was one that should have been taken advantage of at the earliest opportunity, unless an excuse for not doing so could be shown.

The notice was served June 1st, and the transcript was

filed June 2d. The motion to strike the cause from the short cause calendar was not filed until July 17th following, which was the same day the cause was reached for trial in the County Court. This, we think, was too long a delay. Although the attorney who was served with the notice was not "retained," as he says, to follow the cause during its pendency on appeal in the County Court, until June 3d, both he and his client, the appellant, were frequently brought into court in relation to the justification of sureties on the appeal bond, during the month of June, and it was the duty of one or both of them to raise the point of irregularity with promptness, and not wait six weeks, and until the time the cause was called for trial.

Here the attorney who was served with the notice on June 1st, was the same attorney who tried the case for appellant before the justice of the peace, and saw to the giving of the appeal bond in that court, and was technically "retained" on June 3d to follow the appeal to the County Court. He had actual knowledge that the notice was served upon him, whether the appellant was bound by it or not, for he refused to accept service, and the notice was left with him, and he indorsed on it the date of its being left.

Presumptively, also, the appellant knew of the notice, for he made an affidavit that he had not "retained" the attorney until after June 2d, as a reason why he should not be bound by the notice served June 1st, but he did not deny that he knew the notice had been left with the attorney.

It was said in *Treftz v. Stahl*, 46 Ill. App. 462, "With such knowledge and reason to believe, if the attorney of the appellant laid by, and suffered the case to go upon the short cause calendar without objection, the irregularity of the service was waived;" and it was quoted from *Lawrence v. Jones*, 15 Abb. Pr. Rep. 110, as follows:

"The rule in cases of mere irregularity requires the party to move at the first opportunity, or show an excuse for not doing so."

The affidavits filed in support of the motion to strike the cause from the short cause calendar establish, simply, the fact that the attorney, with whom the notice was left, was

not "retained" by appellant to follow the appeal through the County Court, until two days after the notice had been so left; and from the context it is plain that by not being "retained" was meant that no money as a retainer had been, on June 1st, paid to the attorney.

Neither the attorney nor the appellant, in their affidavits, say anything about the employment or expectation of employment of the attorney by the appellant in the further defense of the suit, and the weight of the argument of appellant's counsel (who is the same attorney) is that an express technical "retainer" was necessary. An express and formal retainer was not necessary.

"The contract of retainer may be made like any other. It may be express or implied." *Cooper v. Hamilton*, 52 Ill. 119.

It is not necessary to decide that there was an implied relationship of attorney and client existing in this case between the appellant and the attorney at the time the notice in this cause was served on the attorney, although the inferences that such a relationship did exist are strong.

It is enough to hold, as we do, that the irregularity in the service of the notice, if it was irregular in fact, should have been taken advantage of at an earlier day than that on which the cause was reached for trial and tried.

On the trial, the evidence that was heard, although in some respects conflicting, fully justified the court in directing the jury to find the defendant guilty, and the judgment thereupon entered will therefore be affirmed.

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**Louisville, N. A. & C. Ry. Co. v. Jennie E. Carson,
Executrix, et al.**

1. *CONTRACTS—Director of a Corporation, with Himself.*—Although a contract made by an officer for the corporation he represents, with himself, will be strictly scrutinized by the courts, and will be set aside at the suit of the corporation, in the absence of ratification, it is not ab-

L, N. A. & C. Ry. Co. v. Carson.

solutely void, where, in the making of it, the corporation is represented by other authorized agents.

2. *CONTRACTS—Between Corporations and its Officers.*—There is no necessary impropriety in a contract between a director and the corporation, if the latter is represented by other agents. On the contrary, such contracts are, in many instances, the natural result of circumstances, and are justified by the approved usages of business men.

3. *CONTRACTS—Agent of Corporation Representing it in Making a Contract with Himself.*—An agent may represent a corporation in making a contract with himself personally, provided he act under immediate instructions from some other superior agent, or from the board of directors.

4. *LEASE—By an Officer of a Corporation with Himself.*—The mere fact that a lease was executed by an officer of a corporation, with himself, does not avoid it *ab initio*. If the corporation, acting under different formalities and through other agents, could have made the lease a valid one, there is no reason for treating it as absolutely invalid.

5. *RATIFICATION—Void and Voidable Contracts.*—A contract which is voidable only is the subject of ratification, but a contract which is absolutely void can not be rendered valid by ratification.

6. *RATIFICATION—By Corporations Need Not be in Writing.*—A corporation, like an individual, may be bound by a ratification evidenced by its acts, and such ratification need not be in writing, even though it be of an act done without authority.

7. *PLEADING—Non-Assumpsit Verified.*—Under Sec. 84, Chap. 110, R. S., entitled "Practice," which provides that no person shall be permitted to deny, on trial, the execution of any instrument in writing, whether sealed or not, upon which an action may have been brought, unless the person so denying the same shall, if defendant, verify his plea by affidavit, the mode of pleading is not changed, but the rules of evidence only.

8. *PLEADING—Non Est Factum and Non-Assumpsit at Common Law.*—Notwithstanding the statute requiring pleas to be verified, the plea of *non est factum* and *non-assumpsit* may be pleaded as formerly. Under these pleas the defendant may still insist on any legal defense that he could have done at common law, except denying or disproving the execution of the instrument declared on.

Memorandum.—Action for rent. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Declaration for rent, with copy of the lease sued on. Plea, general issue, not verified. Special plea, that at the time of the making of the supposed lease, to wit, the 25th day of April, 1887, the said John B. Carson, one of the plaintiffs herein, was the vice-president and general manager of this defendant, and this defendant avers that said lease in said declaration mentioned, was signed on behalf of this defendant by the said John B. Carson, as vice-president and general manager thereof, as aforesaid, with-

out the knowledge and consent or approval of the board of directors of this defendant, and the signing and execution of which lease on behalf of this lessee, by the said John B. Carson, unto and for the benefit of himself and the other plaintiff herein, was unlawful and void, and against public policy; that after the signing of said lease as aforesaid, this defendant, on, to wit, the first day of May, 1890, vacated and removed from said premises, and delivered up the possession of the same to said plaintiffs, which possession they ever since and do now hold, and this the defendant is ready to verify, etc. Special replication, in which the averment in the plea that John B. Carson, one of the lessors, was the vice-president and general manager of the lessee, and as such official executed said lease on behalf of the lessee, railroad company, is confessed, which confession is followed by matters of avoidance, to wit: that the lease was so executed by Carson as such landlord, for and on behalf of himself, and as such official for and on behalf of his lessee, with the knowledge and consent of the board, and that such execution was not unlawful or void against public policy, and that the same was duly ratified and confirmed by the board; also an averment denying the delivery of possession May 1, 1890, by defendant to its lessors, as alleged in said special plea. Jury waived and trial by the court. Finding in favor of plaintiffs and judgment thereon in the sum of \$6,693.74. Defendant appeals. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

STATEMENT OF THE CASE.

This suit was brought to recover certain rentals alleged to be due from the railway company. The lease was for a term of five years from May 1, 1887, at a total rental of \$35,000, to be paid in monthly installments of \$583.33. Possession was taken under the lease and rentals paid thereon up to and including the month of April, 1890. John B. Carson, who executed the lease with Andrew J. Cooper, as owners and landlords, is the same John B. Carson who negotiated and executed the lease for and on and behalf of the railway company as its vice-president and general manager, and was at the same time one of its directors. May 1, 1890, the railway company vacated the premises. The rent was paid up to the date of such vacation. Carson was a director of appellant in April, 1887, and at the time he executed the lease. The board of directors of that date consisted of Astor, Kennedy, Sloan, Rolston, Cook, Cummings, Roosevelt, Dowd, Root, Smith, Hitt, Carson and Fetter. Fetter lived

in Louisville, Cummings and Carson in Chicago, and the others in New York. The membership of this board was continued as above given from year to year until 1890, with this single exception: in 1888 King was elected in place of Cummings. In 1887 the executive committee consisted of Astor, Kennedy, Sloan, Rolston, Hitt and Dowd, and the membership of this committee continued without change to March, 1890.

APPELLANT'S BRIEF, G. W. & J. T. KRETZINGER, ATTORNEYS.

Appellant contended that an executive officer of a corporation can negotiate and execute a written contract on behalf of his corporation, as its executive officer, with himself, wherein and whereby he becomes the sole party to negotiate the terms and consummate and execute the contract. In such a case his personal interests on the one side, and his official duty — his duty as agent to his principal and trustee to his *cestui que trust*, would be hopelessly hostile and irreconcilably antagonistic. Therefore the law unequivocally and without a single exception or yielding condition prohibits such personal interest and official duty from negotiating with each other, even were it possible for one individual to make a contract with himself as agent and principal, which is impossible. Citing the following authorities: President, etc., City of San Diego v. Ry. Co., 44 Cal. 160; Dobson v. Racey, 3 Sandf. Ch. 62; Pickett v. School District, 25 Wis. 552; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Port et al. v. Russell, 36 Ind. 64; Whichcote v. Lawrence, 3 Ves. 740; Aberdeen Ry. Co. v. Blakie, 1 Macq. Ap. Cas. 461; Michaud v. Girod, 4 How. (U. S.) 503; Coal & Iron Co. v. Sherman, 30 Barb. 553; Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co. 16 Md. 456; Railway Co. v. Poor, 59 Me. 277; Butts v. Wood, 38 Barb. 188; York & Midland Ry. Co. v. Hudson, 19 Eng. L. & Eq. 365; Scott v. Depeyster, 1 Edw. Ch. 513; Verplanck v. Mercantile Insurance Co., 1 Edw. Ch. 85; Hardner v. Butler, 30 N. J. 702; Davis v. Ry. Co., 55 Cal. 359; Andrews v. Pratt, 44 Cal. 309; Wilber v. Lynde, 49 Cal. 290; Field on Corp., Secs. 174

and 175; *Copeland v. Manufacturing Co.*, 54 N. Y. Sup. Ct. Rep. 235; *Thomas, Trustee, v. Ry. Co.*, 1 McCrary, 392; *Wardell v. R. Co.*, 4 Dillon 33; *R. Co. v. Poor*, 59 Me. 270.

APPELLEES' BRIEF, PARKER & HIGGINS, ATTORNEYS.

A lease made by a corporation, through an officer thereof on the one part, with himself on the other part, is not absolutely void, it is at most voidable. 1 Morawetz on Corp., 527; *Bundy v. Jackson*, 24 Fed. Rep. 628; *Bank of Columbia v. Patterson, Admr.*, 7 Cranch, 299; *Proprietor Canal Bridge v. Gordon*, 18 Mass. 296; 1 Spelling on Corp., Sec. 197; *U. S. Rolling Stock Co. v. The Atlantic & Great Western*, 34 Ohio St. 450; *Bartell v. The N. W. Cement Co.*, 33 N. W. Rep. 327; *Parson v. The Concord R. Corp.*, 62 N. H. 537; *The Town of Searry v. Yarnell*, 1 S. W. Rep. 319; 2 Pomeroy Eq. Jur., Sec. 1077; *Duncomb v. Ry. Co.*, 84 N. Y. 190; *Barr v. Ry. Co.*, 125 N. Y. 275; *Mallory v. Mallory Wheeler Co.*, 23 Atl. Rep. 708; *Hotel Co. v. Wade*, 97 U. S. 14; *Jessup v. Ill. Cent. Ry. Co.*, 43 Fed. Rep. 483; 15 Am. Law Review, 917; *Hartz v. Brown*, 77 Ill. 226.

That such a lease is valid if the officer be directed by the board of directors (or the president of the board, where the president could make the lease himself), to execute such lease on behalf of the corporation, see 1 Morawetz on Corp., Sec. 527; 1 Beach on Corp., 402; 1 Bartell v. N. W. Cement Co., 37 Minn. 89; 33 N. W. Rep. 327; *Knowles v. Duffy*, 40 Hun 485; *Budd v. Walla Walla Co.*, 2 Wash. 347; 7 Pac. 896; *Santa Cruz Co. v. Spreckles*, 65 Cal. 193; *Hill v. Nesbet*, 100 Md. 341; *Pneumatic Gas Co. v. Berry*, 113 U. S. 322; *Washburn v. Green*, 133 U. S. 30; *Kelsey v. National Bank of Crawford County*, 69 Pa. St. 426; 1 Spelling on Corp., 210; *Union Mutual Life Ins. Co. v. White*, 106 Ill. 68; *Smith v. Smith*, 62 Ill. 493; *Addison v. Lewis*, 75 Va. 701; *Stratton v. Allen*, 16 N. J. Eq. 229.

President is presumed to have authority to bind the corporation within the powers of the charter. *Crowley v. Mining Co.*, 55 Cal. 273; *Union Mutual Life Ins. Co. v. White*, 106 Ill. 68.

Same presumption as to vice-president. *Smith v. Smith*, 62 Ill. 493.

That the lease made by the corporation through John B. Carson, its vice-president, with himself and Andrew J. Cooper, if voidable in the first instance, was capable of being made valid by the ratification thereof by the corporation, see *Dubuque F. College v. Dubuque*, 13 Ia. 555; 17 Am. & Eng. Ency. of Law, 162; *Beach on Corp.*, Sec. 195; *Oregon Ry. v. Oregon Ry. & Nav. Co.*, 28 Fed. Rep. 505; *Planters' Bank v. Sharp*, 4 Smed. & M. (Miss.) 75; *Greenleaf v. Norfolk Southern Ry.*, 91 N. Ca. 33; *First Nat. Bank v. Fitch*, 75 Mo. 178; *Kelsey v. Nat. Bank*, 69 Pa. St. 426; *Eureka v. Barley Co.*, 11 Wall. 491; *Gold Mining Co. v. Nat. Bank*, 96 U. S. 644; *Will v. Moyer*, 5 Rob. (N. Y.) 259; *Esp. C. Soc. v. Esp. Church*, 1 Pick. (Mass.) 375; *Pac. Rolling Mill Co. v. Dayton Ry.*, 7 Sawyer, 67; 1 *Beach on Corp.*, Sec. 194; *Walworth Co. Bank v. Farmers Loan & T. Co.*, 16 Wis. 633.

That ratification, where the principal could contract in the first instance, is equivalent to original leasing through a competent board of directors, or other competent authority, see *Story on Agency*, 239; *Connett v. City of Chicago*, 114 Ill. 233; *Abbot on Trial Ev.* 441; *Bishop on Contracts*, 330; *Wood v. Whelan*, 93 Ill. 153.

That ratification may be shown by circumstances and acts, see *Am. Ins. Co. v. Oakley*, 9 Paige Ch. 496; *N. Y. & A. Ry. v. Mayor, etc.*, 1 Hilton 587; 17 Am. & Eng. Ency. of Law 164, note 2; *Howe v. Keeler*, 27 Conn. 538.

If the benefit of the contract is accepted by the corporation it is bound thereby. *Kirkland v. Merasha Co.*, 68 Wis. 34; *Paxton Cattle Co. v. 1st Nat'l Bank*, 21 Neb. 621; *Holmes v. Kansas City Board of trade*, 81 Mo. 137; *Paulding v. London Ry.*, 8 Exch. 867; *Beverly v. Lincoln Gas Co.*, 6 Adol. and Ellis 829; *Tuscaloosa & C. Co. v. Perry*, 85 Ala. 158; *Mellidge v. Boston Ins. Co.*, 5 Cush. 153; *Smith v. Martin Arc. Fire Car Heater Co.*, 19 N. Y. Sup. 285; *W. Salem Land Co. v. M. T. Co. (Va.)*, 15 S. E. Rep. 524; *McComb v. Barcelona A. Assn.*, 31 N. E. Rep. 613; *Battelle v. N. W. Cement Co. (Minn.)*, 33 N. W. Rep. 327.

VOL. 51.]

L., N. A. & C. Ry. Co. v. Carson.

Ratification may be presumed indirectly from acts of recognition, and acquiescence beyond the time during which disaffirmance should have been made. *Scott v. Jackson M. E. Church*, 50 Mich. 528; *Gold Mining Co. v. National Bank*, 6 Otto (U. S.) 646; *Benedict v. Maynard*, 4 McLean (U. S. C.) 569.

Silence and acquiescence in, and acting under the contract, estops the corporation to deny its validity. *Zahnski v. Cleveland Co.*, 23 How. (U. S.) 381; *Bissel v. Jeffersonville*, 24 How. 287; *Co. v. Emigrant Co.*, 93 U. S. 124; *Lincoln v. Davenport*, 84 U. S. 801; *Isham v. Buckingham*, 49 N. Y. 217; *Bocock v. Pavey*, 8 Ohio St. 270; *Newbury Co. v. Weare*, 27 Ohio St. 343; *Cassey v. Galli*, 94 U. S. 680; *Goodwin v. Evans*, 18 Ohio St. 150; *Macon & B. Ry. Co. v. Stops*, 85 Ga. 1, 1890 Am. Digest 743, Sec. 189; *Cunningham v. Massena Spgs. & H. C. Ry. Co.*, 63 Hun (N. Y.) 439; *Sherman E. T. Co. v. Morris* (Kan.) 23 Pac. Rep. 569.

That the acts of the corporation in taking possession of the premises, and payment of rent under the lease, and other facts and circumstances proven, show full ratification of the lease, see *Story v. Furman*, 25 N. Y. 230; *Hoyt v. Thompson*, 17 N. Y. 207; *Alcott v. Tioga Co.*, 27 N. Y. 546; *Jordan v. L. I. Ry. Co.*, 115 N. Y. 380; 1 Beach on Corp. 355, Sec. 257; *Oregon Ry. Co. v. Ore. Ry. & Nav. Co.*, 28 Fed. Rep. 508; *Barr v. N. Y., Lake Erie & W.*, 125 N. Y. 275; *Hossac M. & M. Co. v. Donat*, 10 Colo. 529; 16 Pac. Rep. 151. Ratification must be of the whole contract; it can not be repudiated so far as it is onerous, and adopted as far as it is beneficial. Beach on Corp., Vol. 1, p. 402, Sec. 242; *Great Luxemburg Ry. Co. v. Magnay*, 25 Beavan 536; *Cornell v. Clark*, 104 N. Y. 451; *Saltmarsh v. Spaulding*, 147 Mass. 224; 17 N. E. Rep. 316.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

John B. Carson, Van H. Higgins and Henry J. Furber sued the appellant for rent due under a certain lease, dated April 25, 1886, and made by said Carson and one Cooper, to

the appellant, for a term of five years from May first, 1887, of certain rooms in the building known as the Adams Express Building, in Chicago, to be occupied by appellant for its general offices.

The lease was signed by the lessors, Cooper and Carson, and by the lessee, the appellant, by its corporate name, "by John B. Carson, Vice-Prest. and Gen'l Mgr."

The interest of Cooper, one of the lessors, was subsequently transferred to the appellees, Higgins and Furber, and the other lessor, Carson, having died, his executors have been substituted in his place on the record.

The said John B. Carson, one of the lessors, was the same person who executed the lease on behalf of the lessee, the appellant, as its vice-president and general manager, and he was also, at the time he executed the lease, a director of the appellant company.

Possession of the demised premises was taken by the appellant at about the date of the lease and retained for a period of three years, and until May 1, 1890, when appellant vacated and moved out, having paid rent up to that date.

The cause was tried by the court without a jury, and judgment rendered in favor of the plaintiffs for the full amount of rent claimed under the terms of the lease.

On appeal to this court it is contended that the lease was absolutely void, and that no recovery under it could be had, because John B. Carson, a director and executive officer of appellant, made it for the appellant with himself, as owner of the premises.

Although such contracts will be strictly scrutinized by the courts, and will be set aside at the suit of the corporation, in the absence of ratification by acquiescence or otherwise, they are not absolutely void, where, in the making of them, the corporation is represented by other authorized agents.

There is in this case no pretense of unfairness, unreasonableness or imposition, and there is evidence that is not disputed, that in the transaction leading up to the making of the lease the appellant was represented by its other agents, its

president and members of its executive committee and board of directors.

Mr. Carson testified that the appellant removed its headquarters to Chicago in 1884, and leased rooms on the fifth floor of the Adams Express Building for such purposes, and continued to occupy that floor until the spring of 1887, when, needing more room, and after consultation with the president of the appellant company and Mr. Astor, Mr. Hitt and Mr. Ehrhardt, who were directors of the company, he was instructed to finish and partition off the ninth floor, being the premises covered by the lease in question, of the same building, for the uses of the company, said ninth floor being then in an unfinished condition, and that in properly preparing said floor, the owners of the building expended from fifteen to twenty thousand dollars; that after its completion the same gentlemen visited and went over the offices and approved of everything he had done; that as soon as the premises were ready for occupancy the company moved into them and occupied the same for three years or a little over, with full knowledge and approval of every member of the board of directors.

At that time Mr. Dowd, the president, Mr. Astor, Mr. Hitt, and three other directors, comprised the executive committee of the board of directors.

There is no contradiction of the testimony of Mr. Carson, and it finds corroboration in the fact that the rental as paid was charged on the books of the company, and that in the annual reports of the company the location of its offices was named.

It is also further corroborated by the testimony of Elihu Root, one of the directors of the company, during the period named, who testified :

"I do not remember whether the directors took any formal action by way of approving the lease, except that I know it was authorized by the president and well understood by the members of the board;" that he and Mr. Dowd, the president, and quite a number of the directors visited Chicago for the purpose of examining the premises in the latter part of 1886 or early in 1887, and that Mr. Dowd told him of his in-

tention to make the lease, and that he assented to it; that the members of the board approved and consented to the occupancy of the rooms, and to the payment of the rent therefor, as provided by the lease, and that it was a matter of common notoriety that Mr. John B. Carson was one of the owners of the building; that the directors knew as a matter of fact of the lease and of the occupation under it, and that he knew of the intention to make it before it was made, and knew of the making of it at the time it was made.

The truth of this evidence is in no way disputed or attacked. It would seem, therefore, that the bargain itself, as distinguished from the written lease, was the act not so much of Carson in his capacity as a director and officer, as of other directors and officers of the corporation, and one that was plainly within their power as directors and officers to perform.

And we think that the necessary implication from such acts of the other officers and directors of the appellant corporation is that Carson was authorized to do whatever was necessary and reasonable, to secure to the corporation the premises in question. It is said in Morawetz on Corporations, Sec. 527:

“There is no necessary impropriety in a contract between a director and a corporation, if the latter is represented by other agents. On the contrary, such contracts are, in many instances, the natural result of circumstances, and are justified by the approved usages of business men.”

And it is further said in the same connection:

“An agent may even represent the corporation in making a contract with himself personally, provided he act under immediate instructions from some other superior agent, or from the board of directors.”

We think the evidence is as plain as it can reasonably be expected to be in the absence of an express recorded vote of the board of directors, which was not necessary, that Carson had the authority of the board of directors, and the president of the corporation, to lease the rooms in question from himself.

The mere status, alone, of Carson, as owner of the demised premises on the one hand, and as director and officer of the corporation on the other hand, did not forbid him from contracting with himself, with the knowledge and authority of the other officers and directors of the corporation.

Such a lease as was made was one that the corporation could enter into with perfect propriety. These, or some other offices, were necessary to the corporation for the transaction of its business.

The mere fact that it was executed by an officer with himself did not avoid it *ab initio*. If the corporation, acting under different formalities and through other agents, could have made the lease a valid one, we see no reason for treating it, as made, as absolutely invalid. *Bar v. R. R. Co.*, 125 N. Y. 263.

At the most, we regard the lease as but voidable, and not as void. 2 Pomeroy's Eq. Juris., Sec. 1077.

And being voidable only, it was subject to ratification.

Although "a confirmation of a void thing avails nothing" (*Comyn's Dig. D. 1*), and "so if a lease be absolutely void, acceptance of rent afterward does not amount to a confirmation" (*Ibid. A.*), yet, in "every case where a lease is only voidable" (*Ibid. A.*), "by a confirmation, express, or in fact, a voidable estate shall be confirmed." (*Ibid. A.*) *Wurster v. Reitzinger*, 5 Ill. App. 112.

The written lease in question was in the possession of the proper officers of the appellant during the entire three years that it occupied the premises; the stipulated rent was paid, monthly, under it, and such payments entered on the books of appellant; the lease was known and authorized by the president and all the directors, and all the business offices of the corporation in Chicago, were located in the leased premises for full three years, and nothing was said or done to avoid or repudiate it.

Such circumstances of positive acts and acquiescence, make the presumption of ratification very strong, and are ample evidence of ratification in fact.

A corporation, like an individual, may be bound by a rati-

fication evidenced by its acts, and such ratification need not be in writing, even though it be of an act done without authority. *Oregon Ry. Co. v. Oregon R. & N. Co.*, 28 Fed. Rep. 505; *Am. Ins. Co. v. Oakley*, 9 Paige's Ch. 496; *Wood v. Whelen*, 93 Ill. 153; *Howe v. Keeler*, 27 Conn. 538; *Keeley v. R. R. Co.*, 141 Mass. 496.

Our conclusion, therefore, is, that the judgment of the Circuit Court should be affirmed. There may be an additional reason for precluding the appellant from urging that the lease was a void one, and, therefore, not its contract. The plea of *non assumpsit*, which was the only plea filed, was not verified. It is said in *Stevenson v. Farnsworth*, 2 Gil. 715: "If his plea is not verified by affidavit, he is precluded on the trial from controverting the execution of the instrument. The pleas of *non est factum* and *non assumpsit*, may, however, be pleaded as formerly. The statute does not change the mode of pleading, but the rule of evidence only. Under these pleas the defendant may still insist on any legal defense that he could have done at common law, except merely denying or disproving the execution of the instrument declared on."

The actual signing of the lease in the name of the appellant, by Mr. Carson, as vice-president and general manager, is conceded.

If, therefore, the appellant wished to deny the authority of Carson, or in other words, wished to deny that the instrument so executed was the act or instrument of the appellant, it is not easy to see why its plea should not have been verified as required by the statute.

Section 34, Chap. 110, entitled Practice (Hurd's Rev. Stat. 1891), provides that no person shall be permitted to deny, on trial, the execution of any instrument in writing, whether sealed or not, upon which an action may have been brought, unless the person so denying the same shall, if defendant, verify his plea by affidavit.

The allegation of the declaration is that the plaintiffs demised to the defendant certain premises, "and by the same instrument the said defendant agreed and covenanted

to yield and pay therefor * * * as rent for said premises," etc.

If appellant had not so agreed, or, in other words, if the act of Carson in executing the lease in the name of the appellant was not the execution of the lease by appellant, should it not have denied the execution by a verified plea? R. R. Co. v. Neill, 16 Ill. 269; Home Flax Co. v. Beebe, 48 Ill. 138; United Workmen v. Zuhlke, 129 Ill. 298; Supreme Lodge v. Zuhlke, 30 Ill. App. 98; Wurster v. Reitzinger, 5 Ill. App. 112; Delahay v. Clement, 2 Scam. 575; Dwight v. Newell, 15 Ill. 333; Gaddy v. McCleave, 59 Ill. 182.

But this question not having been raised or argued in the cause as presented to us, we need not decide it, the other reasons given being sufficient to require an affirmance of the judgment. Affirmed.

MR. JUSTICE GARY.

The plea of *non assumpsit* not being verified, I think no defense which, expressly or by implication, denied that the instrument sued on was executed by the railway company, was admissible. Supreme Lodge v. Zuhlke, 30 Ill. App. 98. And therefore all discussion of other matter is irrelevant.

MR. JUSTICE WATERMAN.

A director of a corporation may, where other agents act for the company, make a contract with it; but a director can not at the same time act for the corporation and for himself; it is essential to the making of a contract that there be a meeting of minds.

When a contract is reduced to writing it expresses the agreement of the parties; if such agreement appear on the face of the instrument to be between a corporation and an officer thereof, and the execution is by such officer on the one part and the corporation acting only through and by the same officer, as the party of the second part, such writing, as an agreement, or memorandum evidence of a contract, is a nullity; at the most it can be considered but a proposition made by the officer to the corporation; and where the contract is of such a nature that it must be in writing, as a

Lee v. Lee.

conveyance of lands, the writing above described can not, by a mere parol ratification by the company, acting through directors or agents, be made a binding and effectual instrument, because such writing is not the act or deed of the company. An officer of a company can not, acting for and in its name, convey its lands to himself; a deed upon its face appearing to be so made is void; it is not the writing or deed of the company. *Clafflin v. Farmers & Citizens Bank*, 25 N. Y. 293; *Mechem on Agency*, Sec. 68; *Neuendorf v. World Mut. Life Ins. Co.*, 69 N. Y. 339.

Harry L. Lee v. Emma B. Lee.

1. **DIVORCE—Condonation.**—A wife having filed her bill for divorce, afterward went with her husband to a hotel, and occupying the same room, lived with him for some months. *It was held* she could not maintain the suit.

Memorandum.—Divorce proceedings. Appeal from the Circuit Court of Cook County. Heard in this court at the October term, 1893, and reversed, with directions to dismiss the bill. Opinion filed November 27, 1893.

The statement of facts is contained in the opinion of the court.

C. J. WARD, attorney for appellant.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee having filed her bill for divorce, afterward went with her husband, appellant, to a hotel in Chicago, and there, occupying the same room, lived with him for some months. This she does not deny; she merely declares that they did not occupy the same bed or "cohabit." We do not care to go into a consideration of the truth of her statement in this regard.

Apparently she was then living with him as his wife; by her own confession her conduct was such as to be utterly inconsistent with the maintenance of her suit, and such that

she is not permitted, for the matters in her bill alleged, to ask a decree of divorce.

The decree of the Circuit Court is reversed and the cause remanded with directions to dismiss the bill.

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Fish et al. v. Glover.

1. **DEBTOR AND CREDITOR—*Change of Relations.***—A debtor can not, by a sale and conveyance of the property he has pledged as security for his debts, change his relation to his creditor. As between him and a third party, who has undertaken to pay his debt, he may become a mere surety, but as between him and his creditor he remains a principal.

2. **DEBTOR AND CREDITOR—*Right of Party Purchasing Equity of Redemption.***—As between a debtor and a party who, upon purchase of an equity of redemption in a thing pledged, contracts to pay the debt, this purchaser and the pledgee stand as security; but the obligation of the original debtor to the creditor remains unchanged. In such case the original debtor can pay the debt and then proceed against both the pledgee and the surety.

3. **JUDGMENTS—*Entered in Term Time.—Presumption.***—A judgment entered in term time is presumed to have been rendered upon sufficient evidence.

4. **SURETY—*Notice to Bring Suit—To Whom the Law Does Not Apply.***—Sec. 1 of Chap. 132, R. S., entitled "*Sureties.*" providing that when any person bound as surety for another for the payment of money apprehends that his principal is likely to become insolvent or to remove from the State without discharging the contract, if a right of action has accrued on the contract, he may, by writing, require the creditor forthwith to sue upon the same, does not apply to cases where the debtor secures his debt by a mortgage upon real estate and then sells the mortgaged property to another who assumes and agrees to pay the mortgage indebtedness.

Memorandum.—Assumpsit. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed January 11, 1894.

STATEMENT OF THE CASE.

On the 20th day of November, 1889, appellee loaned to appellants the sum of \$8,000, taking their note for the same, and as security therefor, a trust deed by them executed to one Otis R. Glover, of certain mining property land, together with machinery, etc., thereon.

Fish v. Glover.

On the 20th of May, 1890, appellants sold and conveyed their entire interest in the said mining property to one Thompson, who, by the terms of the deed of conveyance assumed and agreed to pay the said mortgage indebtedness. Appellee, upon being notified of this sale and of the assumption of the indebtedness by Thompson, replied "All right."

On the 25th of November, 1890, the agent of appellee presented the note to appellants for payment; they thereupon informed him that machinery, etc., connected with the mine, had been levied upon under writs of attachment, and they asked appellee to foreclose his mortgage in order to protect the property and prevent a sale and removal of the same under said levies; and Mr. Young, agent of appellee, promised that if this were done he, Young, would, at foreclosure sale, buy the property, and would pay the full amount of the indebtedness and all the costs of foreclosure.

December 12, 1890, appellants served written notice upon appellee, requesting him to foreclose his mortgage, and that unless he did so they would claim the benefit of all legal rights to which, as sureties for the payment of said mortgage indebtedness, they might be entitled.

Appellee did not foreclose his mortgage, and certain machinery, etc., was removed from the mining lands and sold under said levies, so that the mortgaged property, originally worth \$10,000, thus denuded, was worth only \$2,000.

Judgment by confession having been entered upon the note, appellants obtained leave to plead to the action, and upon trial before a jury, the above facts appearing, the court excluded all the evidence from the jury and directed a verdict for the plaintiff, and thereafter an order was made that the judgment of \$8,578, entered November 25, 1890, stand.

APPELLANTS' BRIEF, C. W. GREENFIELD, ATTORNEY; D. J. SCHUYLER AND F. W. YOUNG, OF COUNSEL.

As between themselves, the grantee of mortgaged property who assumes the mortgage debt, becomes the principal debtor, and the grantor the surety for the payment of the debt. *Flagg v. Gillmacker*, 98 Ill. 293; *Dean*, use, etc.,

v. Walker, 107 Ill. 540; Ellis v. Johnson, 96 Ind. 281; Comstock v. Drohan, 71 Va. 395; George v. Andrews, 60 Md. 28.

And when notice thereof is given to the mortgagee by the mortgagor, the mortgagee is bound by the relation. Jones on Mortgages, Sec. 1226; Colgrove v. Tallman, 67 N. Y. 96; Russell v. Weinberg, 4 Abb. N. C. (N. Y.) 143; Remsen v. Beekman, 25 N. Y. 555.

Moreover, the mortgaged property becomes the primary fund for the payment of the debt. Comstock v. Drohan, 71 Ill. 912; Jones on Mortgages, Secs. 740, 741; Lilly v. Palmer, 51 Ill. 332; Drury v. Holden, 121 Ill. 130.

And the mortgagor is only secondarily liable. Tripp v. Vincent, 3 Barb. Ch. (N. Y.) 615.

And a release of the grantor or original debtor by the mortgagee does not discharge or affect the liability of such grantee. Ellis v. Johnson, 96 Ind. 381; Tripp v. Vincent, 3 Barb. Ch. (N. Y.) 615.

Appellee, having notice of the intention of appellants to convey the property to one who would assume the payment of the mortgage at the time the loan was made, was bound to accept and be governed by the relation of suretyship when that relation was created, and he made aware thereof. Payne v. Webster, 19 Ill. 104; Brandt on Suretyship, Sec. 29; Flynn v. Mudd, 27 Ill. 323; Kennedy v. Evans, 31 Ill. 258; Trustee of Schools v. Southard, 31 Ill. App. 359; Grafton Bank v. Kent, 4 N. H. 221; Kelley v. Gillespie, 12 Ia. 55.

Right of the surety to discharge does not depend on contract with the creditor. Pooley v. Harradine, 7 Ell. and Bl. 421.

A grantee assuming a mortgage debt and agreeing to pay the same is personally liable, and a personal action may be brought. Rapp v. Stoner, 104 Ill. 618; Dean v. Walker, 107 Ill. 540.

APPELLEE'S BRIEF, GURLEY & WOOD, ATTORNEYS.

A mortgage is but an incident of the debt. The debt is the principal thing. Ryan v. Dunlap, 17 Ill. 40; Lucas v.

Fish v. Glover.

Harris, 20 Ill. 165; Vansant v. Allmon, 23 Ill. 30; Vogle v. Ripper, 34 Ill. 100; Wayman v. Cochran, 35 Ill. 152; Delano v. Bennett, 90 Ill. 533; Dayton v. Dayton, 7 Ill. App. 136; Shifferstein v. Allison, 24 Ill. App. 294.

The lien as between the parties can be destroyed only by payment or discharge of the debt, or by a release of the mortgage. Flower v. Elwood, 66 Ill. 438.

The creditor may pay the debt and be subrogated. James v. Day et al., 37 Ia. 164; Marsh v. Pike et al., 1 Sandf. Ch., 210; Brandt on Suretyship, Sec. 37, and cases cited; Taylor v. Beck, 13 Ill. 376.

A mortgagee may treat mortgagor and his grantee as principal debtors. No novation unless mortgagee has released debtor and accepted his grantee. The mortgagee's rights remain unchanged by the transfer of the property mortgaged. Jones on Mortgages, Secs. 741, 742; Sheperd v. May, 115 U. S. 505; James v. Day et al., 37 Ia. 164, and cases cited.

Marshaling of assets does not apply as between debtor and creditor. Rogers v. Myers, 68 Ill. 92; Plain v. Roth, 107 Ill. 588; Boone v. Clark, 129 Ill. 466; Miller v. Cook, 135 Ill. 190.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

As stated by counsel for appellants, "The defense to this suit is based entirely upon the proposition that at the time the note upon which the suit is brought matured and became payable, the appellants were sureties only for the payment of the debt, and the failure and refusal of appellee to recognize this right, and his refusal to foreclose the mortgage and take possession of and protect the property when the property was sufficient to pay the debt; and, further, because of the refusal of appellee to bring any suit at all in accordance with the statutory notice served on December 12, 1890, appellants have become wholly released and discharged."

This position of the defendants in effect is, that a debtor can at any time, without the consent of his creditor, convert himself from a principal, bound to pay in all events, into a

mere surety, responsible only for a failure of his creditor to realize, as far as by diligence he can, out of security the amount of his debt.

In other words, that a debtor of his own accord may vary the terms of his contract.

That this can not be done, is so plain as to make discussion almost superfluous.

Appellants borrowed money and gave their absolute, unconditional note therefor. The fact that therewith, to secure the same, they executed a trust deed upon their property, did not impair or lessen the obligation imposed by their note.

The surety given was for appellee's benefit, not theirs, and if he has seen fit not to foreclose upon his security, but to rely entirely upon their promise, he has merely sought to enforce their unqualified obligation.

A debtor can not, by a sale and conveyance of the property he has pledged as security for his debt, change his relation to his creditor; as between himself and a third party, who has undertaken to pay his debt, he may become a mere surety, but as between himself and his creditor, he remains a principal. *James v. Day et al.*, 37 Iowa, 164; *Corbett v. Waterman*, 11 Iowa, 86; *Massie v. Mann*, 17 Iowa, 132-135; *Marsh v. Pike*, 1 Sandf. Ch. 210; *Waters v. Hubbard*, 44 Conn. 340.

As between the debtor and the party who, upon purchase of the equity of redemption in the thing pledged, has contracted to pay the debt, such purchaser and the pledgee stand as security; but the obligation of the original debtor to his creditor remains unchanged. *Marsh v. Pike*, *supra*; *Jumel v. Jumel*, 7 Paige Ch. 591; *Dean v. Walker*, 107 Ill. 540; *Shepard v. May*, 115 U. S. 505; *Jones on Morts.*, Sec. 742 a.

In such case the original debtor can pay the debt and then proceed against both the pledgee and the surety. *Brandt on Suretyship*, Sec. 37; *Taylor v. Beck*, 13 Ill. 376-387; *Ayers v. Dixon*, 78 N. Y. 318; *Eddy v. Trover*, 6 Paige Ch. 521; *Kane v. The State*, 78 Ind. 103-107-108; 1 *Story's Eq. Juris.*, Sec. 327-639.

Fish v. Glover.

Counsel for appellants urge that when the loan was made appellee knew that a sale of the property was contemplated to one who would assume the incumbrance thereon, and become the principal in respect thereto; and that appellee was, therefore, bound to observe all the duties which a knowledge of such changed relation required.

Whatever negotiations there were between appellants and appellee prior to the making of the note and mortgage, were merged in those instruments; the writings express the relation and rights of the parties. Moreover, the party to whom it was represented appellants would sell the property did not become its purchaser, or assume payment of the obligation of appellants.

In reference to section 1 of chapter 132 of the Revised Statutes of this State, it is sufficient to say that appellants, as between themselves and appellee, never became mere sureties, but remain, as they undertook to be, principals.

It is urged that the bill of exceptions fails to show that the note upon which, in open court, judgment was entered, was introduced in evidence when appellants were allowed to file pleas and have the cause tried upon its merits. The bill of exceptions does show that a certified copy of the note was before the court upon the trial, and that such copy was, by consent of appellants, introduced in evidence in the place of the original, and that testimony concerning it was given from which its date, amount, maturity, interest and makers clearly appear.

The trust deed was also introduced in evidence, and its execution by appellants proven; upon its recitals judgment might be had.

The judgment entered in term time is presumed to have been rendered upon sufficient evidence.

The warrant of attorney filed with the note when the judgment was confessed, authorized a confession for the amount of the note, and an attorney's fee of five hundred dollars. Only two hundred and fifty dollars for attorney's fees was included in the judgment.

The propriety of such allowance and the sufficiency of the

evidence to warrant it, must be presumed to have been passed upon when the judgment was entered.

No specific objection to the amount of the judgment was made in the court below; and nothing appears in the record showing that the amount of attorney's fees allowed by the Circuit Court was excessive or unwarranted.

Appellants have not shown that the judgment entered against them was in any respect unjust, while it does appear to have been fully warranted by the papers filed and the actual relation of the parties.

The order of court that the judgment entered, stand, is affirmed.

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Homan v. Fleming.

1. **DAMAGES**—\$1,500 *Not Excessive*.—A grocer's delivery wagon was driven by a servant quite rapidly on the wrong side of the street, through a throng of people who had been stopped by a train of cars upon a track across the street, and who, when there came an opening in the train, were hurrying through, and in so doing were off the sidewalk and in the street, and the servant ran over and injured the plaintiff. *It was held*, that a judgment for \$1,500 was not excessive.

2. **VARIANCE**—*Præcipe and Declaration*.—Where the *præcipe* is in trespass and the declaration is in case the discrepancy furnishes no ground for an arrest of judgment, either under Sec. 22, Ch. 110, R. S., entitled "Practice," or at common law.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. McCONNELL, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

HENRY S. GOLDSMITH and JAMES McCARTNEY, attorneys for appellant.

ALEXANDER SULLIVAN and EDWARD J. McARDLE, attorneys for appellee.

Homan v. Fleming.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action on the case for personal injury sustained by the appellee through the carelessness of a servant of appellant. That the servant of the appellant carelessly, and quite rapidly, drove a grocer's delivery wagon on the wrong side of the street, through a throng of people who had been stopped by a train of cars upon a track across the street, and who, when there had come an opening in the train, were hurrying through the opening, and in so doing were off the sidewalk and in the street, and that in so doing the servant ran over and injured the appellee, there is such evidence as justified the jury in finding a verdict for him. And there is also evidence from which the jury were justified in finding that the appellee can never fully recover from the injury; that through life his physical strength and activity will remain diminished.

Nothing in the case until after verdict was excepted to; then a variety of motions was made, but none of them deserve consideration, except that on the motion for a new trial, one ground alleged was that the damages were excessive.

The jury gave \$1,900. The appellee remitted to \$1,500 and judgment was entered for that amount. If the appellee is injured in any material degree for life — being between fifteen and sixteen years of age when hurt — it is difficult to say that the damages are excessive, even though such injury falls far short of what could be characterized as permanent disability.

After verdict the appellee filed an amended declaration which was followed by demurrer, plea and motion by the appellant. We dismiss all that matter with the remark that the original declaration was entirely sufficient, and that such proceedings are surplusage. It is true that the *præcipe* is in trespass, but the count is in case, and even before the statute — Sec. 22, Ch. 110, Practice — the discrepancy was no ground for arrest of judgment. *Toledo, W. & W. Ry. v. McLaughlin*, 63 Ill. 389.

The appellant has not deemed it necessary to abstract any portion of the proceedings in the court below, upon

which he assigns error, but only to index the twenty pages of the record containing them. We might well decline to look into them. *Chicago & G. T. Ry. v. Coolie*, 33 Ill. App. 17, has been followed in many cases.

There is no debatable question in the case except as to the amount of the damages, and it is not so clear that they are excessive as to justify our interference. The judgment is affirmed.

Brown v. Lobdell, Farwell & Co.

1. **MALICE**—*In Action for Deceit*.—Malice is the gist of an action for deceit.

2. **FALSE REPRESENTATIONS**—*Repetition of, Unnecessary*.—A state of affairs once shown to exist, is presumed to continue until notice is given of a change. So where a person procured another to discount notes for him by false representations, it was held, not to be necessary that each time a note was discounted the false representation should be repeated.

3. **FRAUD**—*Fraudulent Purpose Inferred*.—Where one knowingly states what is untrue for the purpose of obtaining property or credit, a fraudulent purpose is inferred.

Memorandum.—Petition for discharge under the insolvent act. Appeal from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

STATEMENT OF THE CASE.

Appeal was arrested on a *ca. sa.* issued upon a judgment by default, rendered in a cause wherein the plaintiff's declaration was as follows:

"For that whereas, the defendant, on, to wit, the early part of December, 1891, in the county aforesaid, then being the president of the Union Grain Company, a corporation organized and existing under the laws of the State of Illinois, applied at the office of the plaintiff, who was then, and is now, engaged in buying and handling commercial paper, to thereafter engage in the business of discounting for him

Brown v. Lobdell, Farwell & Co.

the notes of said Union Grain Company, to be indorsed and guaranteed by the firm of S. A. Brown & Co., of which said firm defendant informed the plaintiff he was the leading member, and to induce this plaintiff to discount for him such paper, falsely represented and stated to this plaintiff that he was worth in the neighborhood of \$800,000; that the business of his said firm of S. A. Brown & Co. was in good condition; that the Union Grain Company had a capital of \$200,000; that \$100,000 has been paid in in cash, and was possessed of a large amount of accumulated profits. And the plaintiff avers that on the faith of said representations and statements this plaintiff shortly thereafter, relying implicitly upon all the statements so made as aforesaid by said defendant, and believing said statements to be true, began to discount for said defendant the paper of the Union Grain Company, and indorsed and guaranteed by said firm of S. B. Brown & Co., of which said defendant was the principal partner, and on the 17th day of March, 1892, relying on and believing in the truth of said false statements, plaintiff discounted for said defendant a note bearing date of March 17, 1892, made by said Union Grain Company, payable to the order of said S. A. Brown & Co., in the sum of \$2,500, ninety days after its date, and indorsed in blank and guaranteed by said firm of S. A. Brown & Co., of which said firm said defendant was the principal partner, and advanced to said defendants for said note of \$2,500, the sum of twenty-five hundred dollars (\$2,500).

And plaintiff avers that on the 22d day of March, A. D. 1892, plaintiff, relying upon the aforesaid false representations of said defendant, and believing them to be true, discounted for said defendant, a note dated March 22, 1892, made by the said Union Grain Company, in the sum of twenty-five hundred dollars (\$2,500), ninety days after its date, and indorsed in blank and guaranteed by said S. A. Brown & Co., of which said defendant was the principal partner, and advanced to said defendant for said note the sum of \$2,500. But the plaintiff avers that the representations hereinbefore alleged to have been falsely made by said

defendant to said plaintiff, to wit, that defendant was worth in the neighborhood of eight hundred thousand dollars (\$800,000), that the business of S. A. Brown & Co. was in good condition, that the capital of the Union Grain Company was \$200,000, of which \$100,000 had been paid in in cash, and that said Union Grain Company was possessed of a large amount of accumulated profits, were each and all false when so made, and were at that time known by said defendant to be false, and were made by said defendant for the purpose of deceiving and defrauding this plaintiff; but on the contrary, that said S. A. Brown & Co., of which said defendant was a partner, said defendant, and said Union Grain Company, were each and all insolvent at the date of said statements, and have so remained ever since.

And plaintiff avers that at the maturity of said notes the same were not paid, and are still in the possession of the plaintiff, unpaid; that long prior to their maturity, said S. B. Brown & Co., of which said S. A. Brown was the principal partner, said Union Grain Company and said defendant failed in business, and were closed up by process of law, and all their property subject to execution has long since been sold, and said notes are absolutely worthless. And so the defendant falsely deceived and defrauded the plaintiff, to the damage of the plaintiff in the sum of \$50,000, and therefore it brings its suit.

HAMLIN, SCOTT & LORD,
Attorneys for Plaintiff."

The judgment rendered upon this declaration was at the March term, 1893, of this court, affirmed in the case of Spencer A. Brown v. Lobdell, Farwell & Co.

Appellant applied to the County Court to be discharged under the insolvent debtor's act.

The court being of the opinion that malice was the gist of the action, refused to discharge him, and he prosecutes this appeal.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

HAMLIN, SCOTT & LORD, attorneys for appellees.

Engel v. Sellers.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Malice was clearly the gist of the action against appellant.

It was alleged that to induce the plaintiffs to discount for him, certain paper, he made certain specified false statements as to his pecuniary condition; that these statements were then known by him to be false and were made for the purpose of deceiving and defrauding the plaintiffs, and that relying upon said false representations, they did discount certain notes for him, which notes are past due, unpaid, and still in their possession.

The declaration contains every element of an action for deceit.

It was not necessary that each time the plaintiffs discounted a note for appellant his representations should be repeated. A state of affairs once shown to exist is presumed to continue until notice is given of a change. *Hutchinson v. Bell*, 1 Taunton 558; *Moyer v. Lederer*, 50 Ill. App. 94.

When one knowingly states what is untrue for the purpose of obtaining property or credit a fraudulent purpose is inferred. *Endsley v. Johns*, 120 Ill. 469; *Nolte v. Reichelm*, 96 Ill. 425; *Hiner v. Richter*, 51 Ill. 299; *Merwin v. Arbuckle*, 81 Ill. 501; *Drabek v. Grand Lodge*, 24 Ill. App. 90; *First Nat. Bank of Flora v. Burkett*, 101 Ill. 391.

The order of the Circuit Court is affirmed.

Engel v. Sellers.

1. **BILL OF EXCEPTIONS**—*Motion for a New Trial*.—A motion for a new trial together with the ruling of the court thereon must appear in the bill of exceptions.

2. **ERROR**—*Burden of Showing*.—A party who complains of an error must bring to the court's attention what it is he complains of.

Memorandum.—Action on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presid-

ing. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 13, 1894.

The statement of facts is contained in the opinion of the court.

GOLDZIER & RODGERS, attorneys for appellant.

PEASE & McEWEN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered against the appellant on three promissory notes made by him, in a suit brought against him by an indorsee of said notes. The defense was the general issue and a want of consideration.

The cause was tried before a jury, and their verdict in favor of the appellee, and the judgment entered on such verdict was, we think, amply justified by the evidence. But even if we thought otherwise, or were in doubt, we should not be able to interfere with the judgment.

The bill of exceptions does not show an exception by the appellant to any ruling of the court or to anything that was done in the case, and does not show that any motion for a new trial was ever made or ruled upon. There is therefore no question, either of law or of fact, upon which we can pass.

There does appear in the transcript of the record made by the clerk of the Circuit Court, but not in the bill of exceptions, a bare statement that the defendant entered his motion for a new trial. Such a statement in the clerk's transcript furnishes nothing for the Appellate Court to act upon.

The motion for a new trial, together with the ruling of the court thereon, must appear in the bill of exceptions. *Pick v. Glickman*, No. 4956, this term; *O. O. & F. R. V. R. R. Co. v. McMath*, 91 Ill. 104.

If a motion for a new trial was made as noted in the transcript by the clerk, it nowhere appears, either in the

transcript or the bill of exceptions, that the court ever acted upon the motion, nor, as before stated, was any exception taken by the defendant, the appellant here, to any ruling of the court or to anything done in the cause.

A party who complains of error must bring to the court's attention what it is he complains of.

The judgment of the Circuit Court will be affirmed.

Commercial National Bank v. Canniff.

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1. **INTERPLEADER—Questions at Issue—Burden of Proof.**—The only question under an interplea is the title to the property in dispute, and upon this the burden of proof is on the interpleader.

2. **FRAUDULENT SALES—Who May Question.**—A sale, however fraudulent it may be, is binding between the parties to it. It can only be avoided at the instance of a purchaser from, or a creditor of the vendor. A party can not be heard to say that a sale is fraudulent until he shows himself to belong to one of these classes.

3. **FRAUDULENT SALES—Intervenors in Attachment Suits.**—Fraudulent sales being good as between the parties to the transaction, whether the defense to the claim of the purchaser be interposed by the officer or the plaintiff in attachment suit, he must first establish the fact of the indebtedness.

Memorandum.—Attachment. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

WEIGLEY, BULKLEY & GRAY, attorneys for appellant.

ANDREWS, MILLER & GETTYS, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The property of one M. H. McCahill, an absconding debtor, having been attached by appellant, appellee inter-

vened, claiming that the property levied upon under the attachment writ belonged to him.

The record fails to show that upon the hearing appellant introduced any evidence showing that he was, when the attachment writ was levied, a creditor of M. H. McCahill, against whom and whose property the writ ran.

As is urged by appellant, the only question under the interplea was, "Is the property in question that of the interpleader?" and, upon this, the burden of proof was on the interpleader. *Marshall v. Cunningham*, 13 Ill. 20; *Dexter v. Perkins*, 22 Ill. 143, 156-7; *Merrick v. Davis*, 65 Ill. 319-322; *Hanson v. Dennison*, 7 Ill. App. 73; *Ripley v. People's Savings Bank*, 18 Ill. App. 430.

It was shown upon the trial that McCahill had sold the goods in question to the intervenor. Appellant contended that such sale was fraudulent, made by McCahill to hinder and defraud his creditors, and that appellee had knowledge of this; appellant also insisted that there had been no such change of possession of the goods as was notice to a *bona fide* purchaser from or creditor of McCahill.

The purchase, and such open change of possession as took place, was sufficient and binding as between McCahill and appellee; if avoided or held fraudulent, it can only be so held at the instance of a purchaser from or a creditor of McCahill; appellant can not be heard to say that such sale was fraudulent, until he shall show himself to belong to one of these classes.

Appellee made out a *prima facie* case which could not be assailed by appellant unless he showed himself to be a creditor of the attachment debtor.

There are expressions in some of the cases cited by appellant, notably in *Merrick v. Davis*, *supra*, indicating that an intervenor admits not only the regularity of the proceedings, but the character assumed by the plaintiff, at whose instance the goods in controversy have been seized; but in principle there is no distinction between the necessity for proof of such character by a plaintiff in replevin or trover and by one who intervenes in an attachment or sets up a right of property as against a sheriff's execution.

C. & W. I. R. R. Co. v. DeMarko.

Fraudulent sales being good as between the parties to the transaction, whether the defense to the claim of the purchaser be interposed by the officer or the plaintiff in an attachment suit, he must first establish the fact of indebtedness. *Brayley v. Byrnes*, 20 Minn. 435; *Cook v. Hopper*, 23 Mich. 511; *Jones v. Lake*, 2 Wis. 210; *Ives v. Hulce*, 14 Ill. App. 391; *Currier v. Ford*, 26 Ill. 489; *Wade on Attachment*, Sec. 205.

The judgment obtained by appellant against McCahill subsequent to the hearing upon the plea of the intervenor, can not be considered by this court; it was not before and was not considered by the trial court. The judgment not being personal, but merely *in rem*, was, when rendered, no evidence of indebtedness by McCahill. *Gilcrist v. Savage*, 44 Ill. 56; *Manchester v. McKee*, 4 Gil. 511; *Brannigan v. Rose*, 3 Gil. 123-128; *Green v. Van Buskirk*, 7 Wallace, 139.

The judgment of the Superior Court in favor of appellee, the intervenor, is affirmed.

Chicago & W. I. R. R. Co. v. DeMarko.

1. BILL OF EXCEPTIONS—*Must be Sealed*.—It is indispensable that a bill of exceptions be sealed as well as signed by the judge who certifies to the same.

Memorandum.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

OSBORN & LYNDE, attorneys for appellant.

WHITEHEAD & STOKER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

51	581
78	304
79	836
51	581
82	388
51	581
86	673

In the common law record of this case we find no error. We can not consider that portion of the transcript sought to be made a record by a bill of exceptions, because the so-called bill of exceptions was not sealed as well as signed by the judge who certified thereto.

It is indispensable that a bill of exceptions be signed and sealed by the judge by whom the same is made. *Widows and Orphans' Beneficiary Association v. Powers*, 30 Ill. App. 82; *Clive v. The Toledo, St. Louis & Kansas R. R. Co.*, 41 Ill. App. 516; *Miller v. Jenkins*, 44 Ill. 443; *James v. Sprague*, 2 Scam. 55; *Mason v. Gibson*, 13 Ill. App. 463; *Morse v. Williams*, 4 Scam. 285; *Cowhick v. Gunn*, 2 Scam. 417.

The judgment of the Circuit Court is affirmed.

Edgar T. Paul v. Lafayette Conwell.

1. **WITNESSES—Competency. How Shown.**—If a party doubts the competency of a witness to testify concerning matters in controversy he may, by cross-examination, show his incompetency, or insist before his evidence is given, that his competency to speak upon the matter be shown.

Memorandum.—Assumpsit for services, etc. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

EASTMAN & SCHUMACHER, attorneys for appellant.

PEASE & McEWEN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action brought in the court below by appellee to recover for certain services claimed by him to have been rendered to appellant.

A plea of the general issue and one of set-off were filed, and appellant also sought to recoup the damage he claimed that he had sustained by reason of the improper way in which, as he insisted, appellee had performed the work for which he sought to recover compensation.

Complaint is made that the court below allowed witnesses for the plaintiff to testify as to who, in their opinion, was superintendent of certain buildings erected by appellant.

We do not so regard the testimony.

The witnesses testified that a certain person was the superintendent at a certain time; this is said to have been the giving of a mere opinion.

The evidence amounted to no more than that the person named, acted as the superintendent. Why a witness who saw a person superintending might not so testify, or if he witnessed the transaction, give evidence that a certain person acted as a carpenter, or was a carpenter, we fail to see.

If appellant doubted the competency of the witnesses to determine whether a man was acting as a superintendent, he might, by cross-examination, have shown his incompetency, or insisted, before his evidence was given, that his competency to speak upon so simple a matter be shown.

The witnesses Hanson and Bagley, testified, as experts, as to the usual compensation paid for the services of architects and superintendents; there was no error in refusing to allow them to testify what the value of plaintiff's services would have been if he was incompetent or improperly discharged his duties.

The letter of May 12, 1890, introduced in evidence by plaintiff, was of little consequence, and its production can not have done appellant any harm. We do not think that appellee should have been permitted to testify that he never guaranteed that the houses would not cost more than the estimate, because there was no evidence that he made such guarantee; but we do not sit to reverse judgments for inconsequential errors.

There is a slight confusion of words in one of the instructions, as modified by the court, but nothing which we think can in any way have misled the jury.

Upon the whole, the case was fairly tried; a different verdict might properly have been reached, but we find in this record no error warranting a reversal of the judgment rendered, and it is affirmed.

Chicago, M. & St. P. Ry. Co. v. Patrick Walsh.

1. **BILL OF EXCEPTIONS—*Must Show that it Contains all the Evidence.***—In the absence of a certificate by the judge that the bill of exceptions contains all the evidence introduced upon the trial, the court is bound to presume that there was sufficient evidence to sustain the judgment of the court below.

2. **BILL OF EXCEPTIONS—*Amendment After the Term is Over.***—An amendment to a bill of exceptions can not be made after the term has passed, from what exists within the personal knowledge and recollection of the trial judge only.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1893, and affirmed. Opinion filed February 1, 1894.

The statement of facts is contained in the opinion of the court.

EDWIN WALKER and JOHN T. FISH, attorneys for appellant.

WALKER, JUDD & HAWLEY, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was distressingly injured on December 20, 1890, by being run upon by a freight train while attempting to cross appellant's railroad tracks at the crossing of them by Chicago avenue, a public street in Chicago.

51	584
150	607
51	584
90	590
51	584
98	634

As a result of the injury appellee lost his left arm by necessary amputation above the elbow, and the second, third and little fingers, and the heel and palm, of his right hand.

He was a plumber's laborer by occupation, and earned average wages of fifteen dollars a week, and was thirty-five years of age at the time of trial, which was about two and a half years after the accident.

The trial of the cause in the Circuit Court resulted in a verdict and judgment of \$29,583.33½, against the appellant.

A verdict so large and so peculiar in amount, would, when objected to upon grounds urged upon our consideration, be subjected to very close scrutiny if we could know that all the evidence heard in the court below was before us.

In the absence of a certificate by the judge that the bill of exceptions contains all the evidence introduced upon the trial, we are bound to presume that there was sufficient evidence to sustain the judgment of the court below. *Tompkins v. Mann*, 6 Ill. App. 171; *Fuller v. Bates*, 6 Ill. App. 442; *Nason v. Letz*, 73 Ill. 371; *Goodrich v. City*, 72 Ill. 121.

In *James v. Dexter*, 113 Ill. 654, it is said: "Whether the finding * * * was correct or not can not be considered on appeal, unless where the bill of exceptions purports to contain all the evidence introduced at the trial." In *Nimms v. Kuykendall*, 85 Ill. 476, this court said:

"We can not say the court decided wrong, for the bill of exceptions does not purport to contain all the evidence, and we must presume there was sufficient evidence to warrant the court in the finding. Numerous other cases in this court declare the same doctrine, so that the practice in that respect is now well settled."

There is no pretense that the certificate to the original bill of exceptions imports that the bill of exceptions contains all the evidence that was introduced.

Our attention was first directed to this omission in the certificate by a motion filed by appellee's counsel in this court to quash the assignment of errors on that ground,

which motion being overruled, the appellant has filed herein what is called by counsel a supplemental bill of exceptions, but which is in fact nothing but a certified copy of an order together with a statement of facts upon which the order is based, entered October 30, 1893, *nunc pro tunc*, as of September 25, 1893, which was the date of signing the original bill of exceptions. It is therein stated as upon the "personal knowledge and recollection" of the judge before whom the cause was tried, that the said original bill of exceptions contained all the evidence offered or introduced on the trial, and it was thereupon ordered "That the certificate of said judge to said bill of exceptions be so amended as to certify the facts by inserting the following, to wit: The foregoing bill of exceptions contains all the testimony and evidence introduced in the case by either and both of said parties."

To the entering of such order and the action of the court relative thereto, the appellee, by counsel, duly excepted.

And appellee's counsel again insist upon their original objection to the sufficiency of the bill of exceptions, and urge that what has been filed here as an amended or supplemental bill of exceptions shall be disregarded because, if for no other ground, it affirmatively shows upon its face that it was made simply from the recollection of the trial judge, and not from any memoranda or minutes kept by the judge, or record of such kind or nature as the law requires that the court must have in order to amend by, after the term is passed.

Ignoring the question as to whether the filing here of what is a mere certified copy of an order, such as stated, is in form a proper amendment to a bill of exceptions, it is enough to say that an amendment to a bill of exceptions can not be made after the term has passed, from what exists within the personal knowledge and recollection of the trial judge only.

However hard the rule may be as applied to this case, the rule is too well settled to be departed from. *Roblin v. Yaggy*, 35 Ill. App. 537; *In re Annie Barnes*, 27 Ill. App.

Marder, Luse & Co. v. Filkins.

151, and cases there to be found; *People v. Anthony*, 129 Ill. 218; see, also, *Seig v. Long*, 72 Ind. 18.

It is affirmatively stated in the recital part of the order brought here as an amended bill of exceptions, that the judge "kept some minutes of the evidence in said case upon the trial thereof, but not sufficiently full to authorize the certificate, from said minutes alone, that said bill of exceptions contained all the evidence," and it then proceeds to further recite that on the motion for a new trial said original bill of exceptions was presented to and examined by said judge, and that from his "personal knowledge and recollection" the bill of exceptions does contain all the evidence.

We can not depart from well settled rules in order to accommodate the exigencies of a particular case, and being bound to presume the court below decided correctly, in the absence of authoritative knowledge that we have before us all that was before the court below, the judgment of the Circuit Court will be affirmed.

Marder, Luse & Co. & W. A. Fowler v. Edward A. Filkins, Assignee of M. H. Kauffman Medical Pub. Co.

11 587
53 639

1. **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*Judgment Creditors—Preferences.***—Creditors of an insolvent corporation who obtain judgments upon their claims, have executions issued and placed in the sheriff's hands prior to the execution and recording of an assignment by said insolvent, will be held as preferred creditors and their claims ordered paid as such.

2. **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—*Assignee Takes Subject to all Liens.***—The doctrine settled is, that when property is assigned by debtors for the payment of the debts of the assignors, the assignee takes it as a volunteer, and subject to all the liens, equities and burdens to which it was subject in the hands of the assignors.

Memorandum.—Voluntary assignments. Appeal from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding. Heard in this court at the October term, 1893, and reversed with directions. Opinion filed January 11, 1894.

The statement of facts is contained in the opinion of the court.

M. BRYANT & M. BLANCHARD, attorneys for Marder, Luse & Co.

G. F. WHITE, attorney for W. A. Fowler.

BANGS, WOOD & BANGS, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The M. H. Kauffman Medical Publishing Company, a corporation, made its deed of assignment to the appellee, dated September 14, 1892, which was filed in the recorder's office of Cook county on the same day at 12 o'clock noon, and in the office of the clerk of the County Court at 12:30 o'clock in the afternoon of the same day.

Two days before, and on September 12th, the appellant, Marder, Luse & Company, a corporation, recovered a judgment, by confession, in the Superior Court, against the insolvent corporation, and caused execution to be issued thereon, and placed in the hands of the sheriff, on the day the judgment was recovered.

On September 14, 1892, the same day the deed of assignment was executed and recorded, the appellant, William A. Fowler, recovered a judgment in open court, in said Superior Court, upon a cause submitted to the court by agreement of parties, without a jury, and caused execution to be issued thereon and placed in the hands of the sheriff on the same day, nearly two hours before the deed of assignment was filed in either the recorder's office, or in the office of the county clerk.

No levy was made under either execution.

The appellants, respectively, filed their petitions in the County Court, setting up the fact of the recovery of said judgments and the issue of executions thereon, and the delivery of the same to the sheriff, and prayed that the amounts of the judgments should be allowed as first liens against the insolvent estate, and paid as such.

To the petition of Marder, Luse & Company, the assignee answered that there was no such valid judgment and execution, and to the petition of William A. Fowler, the assignee answered, neither admitting nor denying its allegations, but called for proof thereof.

The County Court denied the prayer of both petitions for a preference, but allowed them both as general unpreferred claims.

In point of time the two executions were entitled to liens in the order of their delivery to the sheriff, and it is difficult to see when or how they lost priority over the general creditors of the insolvent estate.

It is not claimed in any way whatever, that either one of the judgments was obtained for a debt not fairly and honestly due to its full amount, from the insolvent corporation to the respective judgment creditors, who are appellants; nor is it claimed that either judgment was recovered as a part of a plan to make an assignment by the insolvent.

And even though it were so claimed, the evidence, on the hearing of the petitions, which we have carefully scrutinized for the disclosure of such fact, if it were so, clearly shows that the assignment was precipitated by a report subsequent to the recovery of the last judgment, that possession of the property of the insolvent was threatened to be taken under an alleged fraudulent chattel mortgage.

The only reason presented to us by counsel for appellee as to why the judgment of the County Court should be sustained, is the want of authority by the president of the insolvent corporation to confess judgment against the corporation, and incidentally, to facilitate the obtaining of judgment against the corporation as was done in the Fowler suit, and this is based solely on the testimony elicited from Kauffman, the president of the insolvent corporation, that "the board of directors did not give me authority to execute any power of attorney to confess judgment."

It was decided in *Union Trust Co. v. Trumbull*, 137 Ill. 146, that a proceeding in the County Court under the act relating to assignments by insolvent debtors is a proceeding in equity, and not a purely statutory proceeding.

Nothing being shown, or pretended to exist, which in any manner detracts from the equities of the claims of the respective appellants, the liens of the executions should not be avoided for mere want of authority to confess, or consent to the judgments.

Burch v. West, 134 Ill. 258, was a case where a receiver brought a bill in equity to enjoin the sale by a sheriff under executions, issued upon judgments entered by confession against a corporation, mainly upon the ground that the officers who executed the notes and warrants of attorney, upon which the judgments were confessed, had no authority to execute the same; and, assuming "that the officers of the company were not authorized to execute the powers of attorney," the court said:

"All of the judgments were based upon full, adequate and valuable considerations, and nothing appears in the record to charge any of the judgment creditors with fraud, or to show that any of the judgments were collusively confessed, when no indebtedness, or no sufficient indebtedness, existed. Nothing appears in the record to impeach the justice of the judgments. * * * In this case, there being no injustice and no fraud in the judgments, neither the printing company, nor its creditors, nor the receiver, have any right to relief in a court of equity." See, also, Packer v. Roberts, 40 Ill. App. 445.

The fact that it is the assignee of the judgment debtor who invokes the lack of authority by the president of his insolvent principal, lends no additional weight to the objection.

"The settled doctrine is, that when property is assigned by debtors for the payment of the debts of the assignors, the assignee takes it as a volunteer, and subject to all the liens, equities and burdens to which it was subject in the hands of the assignors." Union Trust Co. v. Trumbull, *supra*.

Upon the record, as here presented, no good reason appears why the claims of both appellants, Marder, Luse & Company, and William A. Fowler, should not be allowed as preferred claims, and ordered to be paid, as such, by the

Bolton v. Huling.

assignee, against the proceeds of all the property upon which the executions were a lien, in the order of their priority as between themselves; and the judgment of the County Court is therefore reversed with directions to so allow and order concerning the same. Reversed with directions.

Bolton v. Huling et al.

1. *CONTRACT—Interpretation.*—Where a contract is clear and unambiguous in its terms, it is error for the trial court to admit evidence as to what was meant by the parties to it.

51	591
91	853
51	591
8196s	885

Memorandum.—*Assumpsit.* Appeal from the Circuit Court of Cook County; the Hon. SAMUEL P. MCCONNELL, Judge, presiding. Heard in this court at the October term, 1893. Reversed and remanded. Opinion filed December 21, 1893.

The statement of facts is contained in the opinion of the court.

N. M. JONES, attorney for appellant.

WALTER L. FISHER, attorney for appellees.

MR. PRESIDING JUSTICE SHEPARD, DELIVERED THE OPINION OF THE COURT.

On the 22d of January, 1890, appellees made a written proposition to appellant in relation to the purchase from him of two lots on Indiana avenue, Chicago, and the sale to him of one lot on State street, Chicago, as follows:

"We will give \$37.50 per foot, cash, for lots 21 and 22, in block 4, Davidson's Sub. of Lots 7, 8, and part of 12, of Wilson, Heald and Stebbing's Sub. of the East $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ Sec. 15, T. 38 N., R. 14, being the 3d and 4th lots north of 63d street, west front on Indiana avenue. Title to be merchantable, and a merchantable abstract to be furnished brought down to date.

E. C. HULING & Co."

"JANUARY 22d, 1890.

"We will furnish you lot (29) on State street, west front, in Jno. N. Wheeler's Sub. S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 10, T. 38, N., R. 14, located on State street between 54th and 55th, at \$1,950, 25 x 160 feet or more, to alley.

E. C. HULING & Co."

On the back of the above written proposal, the appellant wrote as follows:

"I accept the within if title proves satisfactory.

JAMES BOLTON."

The sale to appellant of the State street lot was consummated in March following, he receiving a deed therefor from one Flanagan.

Upon examining the title to the Indiana avenue lots, two objections were discovered and insisted upon, one in the nature of a tax title, and another of an undivided ownership by a third party, in a part of the lots, which the appellant was unable, or unwilling, to remove, because of the large amount of money exacted by the holders of the adverse claims or titles.

The Indiana avenue lots were, together, fifty feet in width, which at the price per front foot named in the proposition, would equal \$1,875, and the persons in whom were vested the interests outstanding and adverse to appellant's title, would not relinquish their claims to appellant for a sum of money, much, if at all, less than the entire purchase price he was to receive.

With those adverse interests outstanding, it can not be said that appellant could give to the purchaser a "merchantable" title, and the purchaser being, properly, unwilling to accept a less title, the appellant finally, and in October, 1890, declared he would go no further in executing the contract.

This suit was thereupon begun and resulted in a judgment against the appellant for \$2,375, that sum being found by the court to be the difference in value of the lots between the date of the contract and the date of its breach, nine months afterward, and it is from that judgment this appeal is prosecuted.

It is interesting, although irrelevant, to comment upon the fact that under the law, if appellant had executed and delivered, and the appellees had accepted, a warranty deed of the lots in question for the consideration to him paid in full, and subsequently his title had wholly failed, the measure of damages would have been the consideration paid with interest, whereas as held in this State, but not in England, for a breach of the contract to convey, no consideration whatever having been paid, the measure of damages is the difference in value of the premises between the date of the contract and of its breach, which, in this case, is a sum considerably in excess of what he would have been mulcted in had he given a deed and received the whole consideration.

It would seem in the interests of consistency as if the rule of law, in one case or the other, ought to be changed. We do not doubt, however, but the rule, as it is, as to the measure of damages, was correctly applied by the court.

The question is, was the proper construction of what the contract was, properly determined by the court.

We think not. The two propositions were submitted to the appellant at the same time and on the same paper. While either one was a complete proposition in itself, and was separable from the other, if the appellant had chosen to so treat it, they were both in fact accepted by him by the single acceptance written across the back of the paper containing them. His acceptance applied, so far as its terms indicated, as well to both as to either one. Had the propositions been written on separate sheets and submitted at different times, the identical words of acceptance employed by appellant would, if indorsed on each separate sheet, have been a good acceptance as applied to each proposition.

Nothing was lacking in the words of acceptance to make them complete, and for a breach he would have been as clearly liable on the one as on the other.

"If title proves satisfactory," is as applicable to his agreement to sell as to his agreement to buy.

A man may well say, I will buy your land if your title is satisfactory to me, and just as well may he say, I will sell you my land if my title is satisfactory to you.

It was his right to say, in the one case, I will not engage to tie myself up in a contract to buy your land unless your title proves satisfactory to me, and in the other case, I will not tie up myself or my land in a contract to sell you my land unless my title proves satisfactory to you.

It was commendable prudence on appellant's part to so guard himself, having in view the many disreputable practices in beclouding titles of which common knowledge exists, and the words he employed show clearly enough what his intention was. That both parties so understood it can most certainly be inferred from the action that was afterward taken with reference to each proposition. The language used by the appellant being clear and explicit, and the paper upon which it was written relating to both propositions, it was error for the trial court to admit evidence of what was meant by the parties. Such evidence being improperly in the record we should not look at it to determine whether the minds of the parties met upon any different interpretation to be given to the propositions and their acceptance.

Considered together, the propositions and the acceptance created a contract, or two contracts, clear and unambiguous in terms, that required no explanation, and no recourse to evidence in explanation thereof should have been admitted.

Upon the whole case the appellees were not entitled to recover, and the judgment of the Circuit Court should have been for the appellant.

The judgment will therefore be reversed and it is so ordered; and the case having been tried by the court below without a jury, we will enter final judgment here for the appellant upon a finding of the facts.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1893.

51 595
110 *864

The City of Springfield v. Michael Burns.

1. **NEGLIGENCE—Exercise of Ordinary Care.**—In actions for personal injuries the question as to whether the plaintiff was in the exercise of ordinary care is a question of fact for the jury.

2. **INSTRUCTIONS—Cities and Villages—Sidewalks.**—An instruction that a city is not bound to keep its walks in reasonable repair for their entire width, is erroneous.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

DAVIS McKEOWN, city attorney, and CONNOLLY & MATHER, for appellant.

JOHN C. SNIGG, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment for \$300, on account of personal injury sustained by reason of a defective sidewalk.

The brief of appellant is confined mainly to a discussion of the evidence.

The plaintiff was no doubt injured by stepping into a hole in the walk where the plank had worn, or been broken off, and there was evidence tending to show that the defect had been there long enough to charge the city with notice.

The only difficult question of fact was whether the plaintiff used ordinary care. It appears that a short distance west of where the injury occurred the walk was in a worse condition than there—that the plaintiff passed over that part of the walk in safety—and that when he got to the point in question he went along the north edge of the walk to avoid the mud and slush which covered the middle and the south side.

In doing so he stepped in the hole. It is argued that by the exercise of proper care he could have avoided the injury. It was dark, or nearly so, and misty, and for this reason he failed to see the dangerous place, as he says. Whether he exercised the proper degree of care was for the jury—and we think there is enough evidence to warrant their conclusion on this point.

That the city was in fault is clear enough. The court instructed the jury very fully upon the duty of the plaintiff to exercise ordinary care, and the city has no occasion to complain in this respect.

It is urged, however, that the court erred in modifying an instruction which was intended to advise the jury that the city was bound to keep its walks in reasonable repair but not for their entire width. The modification consisted in striking out the words *but not for their entire width*. This was right. The duty of the city is not limited to any part of the walk.

Persons may properly travel along the edge of a sidewalk at any time and more especially so when it is apparently necessary in order to avoid mud and slush on the other portions thereof. We find no error and must affirm the judgment.

William Partlow, Administrator, etc., v. Illinois Central Railroad Company.

51	597
1504	321
51	597
59	129

1. INSTRUCTIONS—*Must be Contained in the Abstract.*—When a party bringing a case to the Appellate Court fails to copy the instructions complained of, or any that were given on either side in the abstract, the court will be entirely justified in declining to consider errors assigned upon them.

2. RAILROADS—*Speed of Trains.*—It is not negligence *per se* to run a train at a speed of forty or fifty miles per hour through an incorporated town when there is no ordinance regulating the speed of trains.

3. NEGLIGENCE—*Omissions to Look for Trains.*—The jury should not be instructed that the omission to look and listen for the approach of a train is negligence *per se*.

4. RAILROAD CROSSINGS—*Care in Approaching.*—When one approaches a railroad track and observes that there is nothing to obstruct his view, and that there are no other sounds to prevent hearing an approaching train, he may rationally conclude it is safe to cross, and in such case he will not be required to make a more particular examination.

Memorandum.—Action for personal injuries. Error to the Circuit Court of Coles County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 4, 1893.

The opinion states the case.

CRAIG & CRAIG, attorneys for plaintiff in error.

HORACE S. CLARK, attorney for defendant in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff in error brought an action against the defendant in error for causing the death of the intestate. A trial by jury resulted in a verdict and judgment thereon for the defendant.

The intestate was fatally injured by a collision with a passenger train on defendant's road at a crossing in the village of Humbolt. The train was one of the fastest on the road and made no stop at this station. It was running forty to fifty miles an hour. It is undisputed that the whistle was sounded at the crossing a quarter of a mile north of that where the collision occurred, and according to the testimony of the train men there was no want of later signals by

whistle or bell of the approach of the train. The deceased and Hushong, his brother-in-law, were in a wagon approaching the road from the west. It was just at nightfall, though not very dark. Hushong escaped without serious injury. He testifies that as they approached the track, when about fifty yards from it, he and the deceased looked for trains; they did not stop and listen, but looked. At the point where they then were the view of the track northward whence the train was coming was obstructed by buildings and freight cars.

They did not discover the train until just as they reached the crossing. Their horses were blind. It is uncertain whether the team got upon the track or whether it was driven against the train, but as the horses, wagon and men were all found on the west side of the track it is quite probable the latter theory, which is not without support in the testimony, is the correct one.

The jury found the defendant not guilty, and found specially that the deceased did not exercise care, and that the defendant gave the necessary signals and was not guilty of want of care. There were other special findings as to probative or evidentiary matters, which, when taken together, are in support of those stated, as to the ultimate facts upon which the proper solution of the case depends.

We think the evidence justified these special findings that deceased did not exercise ordinary care and that there was no negligence on the part of the defendant. If the jury were right in the conclusions thus reached, or either of them, the general verdict for defendant was necessarily correct, and unless the jury were improperly guided by the instructions the judgment must be affirmed.

It is insisted that there is manifest and prejudicial error in the instructions.

The plaintiff in error has failed to copy the instructions complained of or any that were given on either side, in the abstract, and for this reason we would be entirely justified in declining to consider the point thus made. *Miller v. Newell*, 29 App. 192; *Fenter v. T.*, *St. L. & K. C. R. R.*, *Ib.* 250; *Florez v. Brown*, 27 App. 270.

We have, however, consulted the record and given the matter such examination as seems necessary to dispose of the question thus presented. The court gave the following at the request of the defendant:

1. In the absence of any proof of an ordinance limiting the speed of a railroad train through a city or village, the railroad company would have a right to run its trains through any such village or city at any rate of speed thought proper, consistent with the safety of its trains and passengers, and of persons rightfully upon its right of way at road crossings who were exercising ordinary care in crossing the railroad, and any person without ordinary care crossing such railroad and receiving any injury for the want of such care could not recover therefor on account of such speed alone.

2. That in the absence of any proof of a village ordinance such a rate of speed as is customary among railroad companies with their fast trains is not in itself negligence on the part of the railroad company.

We think no valid objection can be taken to the first instruction. It limits the right of the company to run at any rate of speed by the duty to care for the safety of passengers and of persons rightfully on the right of way.

The second may be criticised because it refers to "such rate of speed as is customary among railroad companies" as fixing a standard.

What is or is not customary in this respect is not the question, but we can not see that any harm could have been done by this instruction.

It merely amounted to this, that the rate of speed proved in the present case was not in itself negligence on the part of the company.

That is to say, the jury are not to infer negligence merely from the fact that the speed was forty or fifty miles per hour, as proved. It might be negligent or it might not, but it was not so necessarily. There was no municipal ordinance fixing the speed of trains when passing through the corporation.

It is urged that the court erred in giving the following: "Every person is bound to know that a railroad crossing is a dangerous place and he is guilty of neglect unless he approaches it as if it were dangerous, and if the jury believe from the evidence that the deceased, as he approached the railroad track in the wagon, driven by his brother-in-law, did not look or listen to ascertain if a train was coming and observe all reasonable precaution to avoid danger, but on the contrary, the team was driven directly onto the track where the accident happened, without any steps being taken by the deceased or his brother-in-law to ascertain if a train was approaching, then the deceased was chargeable with such negligence as precludes a recovery in this case, unless the jury believe from the evidence that the servants of the railroad company were guilty of gross negligence."

It is no doubt the well settled rule in this State that the jury are not to be told that the omission to look and listen for the approach of a train is negligence *per se*.

As a matter of argument it has been repeatedly said that such omission in the particular case was negligent.

And it may be said that it is so usually or generally, though not necessarily, in all cases.

This instruction would be erroneous within the rule were it not for the clause "but on the contrary the team was driven directly onto the track where the accident happened without any steps being taken by the deceased or his brother-in-law, to ascertain if a train was approaching." We can not understand how a man can be said to exercise ordinary care at such a place when he uses no more than he would at a place not dangerous, such as the crossing of an ordinary wagon road for example. It may be said that this clause is merely another statement of the proposition that it is negligence not to look and listen—and it may be asked what other steps can one take?

When one approaches a railroad track and observes that there is nothing to obstruct his view, and that there are no other sounds to prevent hearing an approaching train, he may rationally conclude it is safe to cross, and in such case he

would not be required to make a more particular examination.

And even if he were to see a train coming, yet at such a distance as to make it apparently safe to cross ahead of it, he may prudently do so, though he would not be justified in making the attempt if it were doubtful whether he could do so without risk; but when it is apparent that by reason of intervening buildings and freight cars a train might be coming and not visible to him, and that by reason of other noises he might not be able to distinguish the sound of the train, then as a matter of common prudence he ought to take some special care for his safety and not content himself with the reflection that he neither sees nor hears a train. He must know that there is danger and if he goes on as though there was no danger he can not be free from negligence. This is all the jury were told by the instruction, when it is fully and fairly considered, and it is all they would understand in view of the evidence to which it was to be applied.

As above stated, the view was obstructed, and according to the proof one of the buildings was a grain elevator which was then in operation.

Here, then, was a situation where the train, if there was one, could not be seen, and perhaps it could not be heard, and yet no proper precaution was taken.

We quote from Hushong's testimony:

Q. Now, you may tell whether you listened for any train there before you drove on the track, and whether you looked? A. We looked. We didn't stop our team and listen, but then we looked for the train.

Q. Did you hear any whistle blow, or any bell ring, or anything of that kind? A. No, sir.

Q. You may tell if there was one of those elevators there running? A. The one next to the depot was running—the north elevator.

Q. Was that on the railroad's right of way? A. I believe it is; I couldn't say for certain.

Q. If the right of way is 100 feet on each side, state whether it would be on the right of way, or not? A. Yes, sir; it would be.

Q. You may tell whether there were any cars standing there anywhere? A. The side track was full from the depot down to the road to the crossing where we started across.

Q. How near did they come to the wagon track where you crossed the railroad? A. They were down within twenty feet of the wagon road.

Q. From the depot down? A. Yes, sir.

Q. Now, you may tell how long you saw the cars before you were struck? A. Well, just as we drove across the side track my brother-in-law says, there is the train; and just as he went to pull up on the lines to say whoa, the train hit the team; that is the first we had seen or heard of it.

In view of the case made by the proof, we are inclined to hold no error was committed in giving this instruction.

But, as already stated, the jury found specially that the defendant was not guilty of a want of ordinary care. If this was so, then there could be no verdict for the plaintiff, and it was immaterial whether the deceased was exercising ordinary care or not. Therefore, even if the instruction was erroneous, the error was harmless in view of this special finding that the defendant was not negligent.

It is also objected that the court would not admit evidence offered by the plaintiff to show that the village officials, or some of them, had complained to the railroad company of the speed of this train. We think the evidence was properly excluded. The village board might have passed any ordinance on the subject within its lawful power, and so have controlled the rate of speed within the corporate limits, but had not done so.

If the customary speed of the train at that place was dangerous, the company was bound to know it without being so notified by the village officials, or any one else, and if it was not dangerous, no mere complaint would make it unlawful.

We find no error in the record, and the judgment will be affirmed.

**Henry Pratt and John J. Ryan, Partners as Henry Pratt
& Co., v. Paris Gas Light & Coke Co.**51 603
155 531

1. **PATENTS—Jurisdiction of State Courts.**—In an action in a State court for the recovery of the price agreed to be paid for the use of a patent, the defendant may, for the purpose of showing a failure of consideration, prove that the patent is void because it is an infringement of a prior patent.

2. **PATENTS—Jurisdiction of State Courts.**—The Federal courts have exclusive jurisdiction of all actions to annul letters patent, and of actions between the owners of adversary patents to determine questions of priority and infringements.

Memorandum.—Assumpsit for goods sold, etc. Appeal from the Circuit Court of Elgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

The opinion states the case.

JOHN T. RICHARDS, JOSEPH E. DYAS and DANIEL F. RAUM,
attorneys for appellants.

APPELLEE'S BRIEF, H. VAN SELLAR AND F. W. DUNDAS,
ATTORNEYS.

The law, we submit, is, that whenever a suit is brought on a contract in a State court and the question of the validity of a patent comes up collaterally or grows out of the contract, then the State court has jurisdiction to hear and determine the matter. *Sigle v. Brooks*, 25 Ill. App. 210; *Nye v. Raymond*, 16 Ill. 154; *Sareburn v. Jackson*, 60 Conn. 569; *Middlebrook v. Boodburn*, 47 N. Y. 446; *Bebein v. McKinzie*, 47 N. Y. 662; 3 *Wait's Actions and Defenses*, 766; *Dickenson v. Hall*, 14 Pick. 220; 18 *Am. & Eng. Ency.*, 70, 71, 141; *Page v. Dickenson*, 28 Wis. 690; *Rice v. Garnhart*, 34 Wis. 453; *Saxton v. Dodge*, 57 Barb. 84; *Slemmen's Appeal*, 58 Penn. 155.

The fact that a patent can not be used without infringing on other patents is a good defense. *Davis v. Gray*, 17 Ohio,

330; Orr v. Bunwell, 17 Ala. 378; 17 Am. & Eng. Ency., 141.

If a patent is invalid, that is a good defense. Nye v. Raymond, 16 Ill. 153.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was assumpsit by appellants against appellee to recover the price of a certain apparatus for the manufacture of water gas, furnished by the former to the latter under a contract in writing. The appellee pleaded the general issue and four special pleas. These latter were in effect that the consideration had failed, that the contract had been entered into upon false and fraudulent representations by the appellants, as to material facts, involving the right to use the patent for the manufacture of gas by the apparatus in question, and that the appellants had failed to indemnify the appellee against the claims of the real owner of the patent.

The court overruled a demurrer to the special pleas and thereupon replications were filed. The issues were found by a jury for the appellee, and after denying a motion for a new trial, the court entered judgment accordingly, from which appellants prayed the present appeal. The evidence tended to show :

1st. That while the parties were negotiating, the appellee distinctly informed appellants that it would not buy the apparatus if there was any question as to the right to use the patent, and that if there was any claim of that sort, whether valid or not, it would have nothing to do with the matter; and that the appellants then represented that while there had been a claim that the patent was an infringement upon what was known as the Springer patent, that claim had been abandoned and there was then no such claim made by the holders of the Springer patent, and that upon the faith of this representation the appellee signed the contract.

2d. That this representation was false and so known to appellants, and that shortly after the contract was signed,

Pratt & Co. v. Paris Gas Light & Coke Co.

and while the apparatus was being put in place, the appellee was notified by the National Gas Light and Coke Company, that the use of the apparatus would infringe upon the Springer patent, and that a suit would be brought against appellee if it should use the same; that appellee then notified the appellants of the fact, and of its unwillingness to proceed further in the matter, and that appellants, to induce the appellee to proceed, promised to give the appellee a bond of indemnity against any loss in the premises, whereupon the appellee consented to proceed, but that the bond was never given.

3d. That a suit was brought against the appellee by the National Gas Light and Coke Company in the U. S. Circuit Court for the Southern District of Illinois for an infringement of said Springer patent, which suit, though brought nearly four years previously, and which appellants, by the terms of the contract, were bound to defend, was still pending and undetermined.

4th. That the use of the apparatus was an infringement on the Springer patent, and that the appellee was liable for damages on that account for the time during which it had used the apparatus, a period of a year or more, and it appearing that appellants were not defending said suit as by the true meaning of the contract they were bound to do and that they would not execute the bond of indemnity as agreed, appellee quit using the apparatus and notified appellants that it would not pay for the apparatus and that the same was subject to their order.

We are inclined to hold that the jury were warranted by the proof in finding that the contract was entered into upon the faith of the representation that the right to use the patent was not disputed and that this representation was known by appellants to be untrue when it was made; and further that appellee was justified in its refusal to proceed under the contract on being apprised of these facts.

Hence the agreement then made by the appellants to give an indemnity in the form of a bond (in addition to the covenant in the contract to defend any suit brought for

infringement) was upon a valid consideration, and the failure to comply with this agreement was good reason for refusing to use the apparatus or to pay for it.

We are also inclined to hold that the pendency of the suit in the Federal court for so long a period, unexplained, sufficiently supports the allegation of the plea that the appellants had failed to defend the suit as by their contract they had agreed to do.

The more difficult question arises from the apparent fact that the verdict of the jury may not have been based upon a finding of these matters favorably to the appellee, but upon a finding that the use of this apparatus was an infringement of the patents controlled by the National Gas Light & Coke Company.

If the appellants had no right to sell to appellee the privilege of using this apparatus because it was such infringement, then it is clear there was a total failure of consideration, and upon this ground the appellee was entitled to the verdict.

The apparatus was wholly worthless to appellee if it could not be safely used, and the presumption is that what benefit was derived from its use up to the time it was abandoned would be fully met by the liability to account for damages in the shape of royalty to the holders of the patent infringed upon, irrespective of the loss necessarily arising from having to make a change in its method of manufacturing gas. *Rice v. Garnhart*, 34 Wis. 453; *Bliss v. Negus*, 8 Mass. 46.

The appellants insist, however, that the issue thus presented was not within the jurisdiction of the court to try, and that it could be determined only in the courts of the United States.

If this position is well taken the judgment must be reversed, and so the question of vital importance is:

In an action in a State court for the recovery of the price agreed to be paid for the use of a patent may the defendant, for the purpose of showing a failure of consideration, prove that the patent is void because it is an infringement of a prior patent?

That the Federal courts have exclusive jurisdiction of all actions to annul letters patent and of actions between the

owners of adversary patents to determine questions of priority and infringement is not a matter of doubt. As to this there is no conflict of judicial opinion.

The present is not such a proceeding. It is merely an action on a money demand to which there is interposed the defense of a want or failure of consideration, and in support of this defense the validity of the patent is involved. The point arises collaterally.

The weight of authority as we find it, is that the State court has jurisdiction in such case. Page v. Dickerson, 28 Wis. 694; Rice v. Garnhart, *supra*; Middlebrook v. Broadbent, 47 N. Y. 443; Saxton v. Dodge, 57 Barb. 84; Slemmer's Appeal, 58 Penn. 155; Nye v. Raymond, 16 Ill. 154.

Other cases to the same effect are cited in these; opposed will be found Elmer v. Pennel, 40 Me. 480; and perhaps others.

As to the ruling of the court upon instructions we think the complaint of appellants not well founded.

Although the court refused the instructions set forth in the abstract, yet we find that it gave nineteen others at the instance of appellants, not abstracted, in which the law was stated with sufficient clearness and accuracy.

The objections to those given at the request of appellee are unsound if the general views we have above expressed are correct. It seems not necessary to discuss these objections in detail. The judgment will be affirmed.

Illinois Central Railroad Company v. John Quirk, Administrator of the Estate of Patrick H. Quirk, Deceased.

1. **NEGLIGENCE—*Must Be Shown or There Can Be No Recovery.***—In actions for personal injury the result of negligence on the part of the defendant, proof of the acts constituting the negligence must be made by the plaintiff or there can be no recovery.

2. **RAILROADS—*Not Liable for Criminal Acts of Others.***—A railroad company is not liable for injuries resulting from the criminal acts of third parties in causing a wreck of its cars.

3. EVIDENCE—*Records of Conviction of Persons Causing Wrecks.*—In an action for damages for a death caused by negligence, it is not error to refuse to admit in evidence certified copies of the record of the trial and conviction of the persons for the murder of appellee's intestate by causing the wreck of appellant's cars.

Memorandum.—Actions for damages occasioned by death from negligent act. Appeal from the Circuit Court of Champaign County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1898. Reversed and remanded.

The opinion states the case.

WOLFE & STOKER, attorneys for appellant.

APPELLEE'S BRIEF, THOMAS J. SMITH, ATTORNEY; C. B. SMITH
AND J. L. RAY, OF COUNSEL.

In an action for damages causing death by negligence, a verdict of not guilty upon an indictment for homicide, is not admissible in evidence. *Marsh v. Walker*, 48 Texas, 372; *Cottingham v. Wicks*, 54 Ga. 275; *Gray v. McDonald*, 16 S. W. Rep. 398.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

On the night of May 28, 1891, Patrick Quirk, who was a locomotive engineer, and while in the discharge of his duty as such, lost his life in a wreck on the Illinois Central Rail road. His administrator brought this suit to recover damages therefor, alleging that the wreck was caused by the unsafe condition of the track, and recovered a judgment for \$3,000.

It appears that the railroad company had been ballasting its track. The work had progressed north from Centralia and it was a matter of dispute as to how far it had been completed with respect to the point where the accident occurred.

Appellee insisted and offered evidence tending to prove that it was incomplete at that point and that by reason of such condition the engine was derailed, and this was the unsafe condition intended to be alleged in the declaration.

The process of ballasting need not be minutely described, but in a general way, three gangs of men were employed, the first of which took out a certain portion of the dirt constituting the road-bed, removed the defective ties and replaced them with sound ones; the second lifted the track, drove spikes and adjusted the ballast which had been deposited by the ballast train after the work of the first gang, and the third gang finished the work, "lined" the track and "trimmed" the ballast between the rails and on the sides. Appellant proved that the work of the second gang had been carried north of the point where the accident occurred and that so far, at least, the track was practically safe, though it was not completely finished. At the time the train was running slowly, ten or twelve miles per hour, on account of this unfinished condition, the deceased being fully aware of the situation.

He had passed over it that morning with an engine coming south. He knew all about it and it is not contended that he was running recklessly. Indeed, it is to be inferred from the proof that he was using proper care, and that the derailment was not due to any negligence on his part. The first question presented is as to the liability of the company in such a case.

It must be clear that the work of ballasting the track was proper, and indeed necessary to make a first-class road, and there was no negligence in undertaking it while the ordinary freight and passenger traffic was being conducted. It was right and proper to do this work, not only for the safety of passengers, but for that of employes, and it was not necessary or practicable to suspend the business of the road while it was going on.

Some inconvenience and extra care on the part of all would, of course, be expected, and this could not well be otherwise.

If the company used all reasonable care in the premises it was not responsible for the injury to the deceased if he was fully advised of the situation. The hazard in such case would be an incident of the service, and conceding that the

wreck resulted from the imperfect condition of the track, it would be necessary to show want of care on the part of the company, or that deceased, without imputation of negligence on his part, was unaware of the extra danger.

As already observed, the deceased knew the situation, and was using due care commensurate thereto. We find in the evidence no sufficient proof that the company was negligent.

The work was carried on with a proper force of men, and in a proper way—with due care in all respects so far as disclosed by the record. Further, the weight of evidence is, as we read it, very clearly to the effect that the second gang of men had passed the point of the wreck; that the track so far was entirely safe for the speed at which the train was moving and that the accident was due to some other cause.

The engine was thrown on the east side of the track, the tender and baggage car, and possibly another car, were thrown on the west.

The rest of the train remained on the track and was subsequently pulled back to Centralia by a relief train.

It was found that one rail on the west side of the track had been loosened. The angle bars connecting it with the next rail south were removed. Those bars were not bent. The bolts which held them in place were out; the nuts were off, and the threads of the nuts and bolts were unbroken. The spikes had been pulled out along the west side of the rail for ten or twelve ties, and a rat-tail file, three-fourths inch in diameter, had been driven into one of the holes from which the spike had been drawn on the "shoulder tie," that is the tie next north of the "joint tie."

This file was broken off close to the wood, and the broken pieces were lying a few feet south.

There were found at the place a claw bar, such as is used for the purpose of pulling spikes, and a track wrench, such as may be used to fasten bolts on angle bars. These tools belonged to the Jacksonville South Eastern Railroad, and had been taken from its tool house a day or two before, by

I. C. R. R. Co. v. Quirk.

some unknown person. A file had also been taken from the same place, similar to that driven into the shoulder tie. There is no reason to believe, from the proof, that these spikes were drawn, or the angle bars removed in the course of the work of ballasting the track. Indeed there is no doubt that such was not the case, and that this was the criminal work of others. The presence of the file driven into the spike hole, also strongly tends to prove that there had been some unlawful interference with the track.

In addition to these circumstances, as to which there is no contradiction, the appellant proved by a reputable witness, that he passed along the highway, parallel with the railroad, returning to his home from a meeting of the Fair Association, of which he was the president, at Centralia, about the hour of ten o'clock of the night of the wreck, and but a short time before it occurred. His attention was attracted by a sound of striking or tapping upon iron, and looking in the direction whence the sound came, he saw two men on the track, at or very near the place of the wreck, one of them holding or leaning on a crow-bar, and the other stooping over and apparently doing something to the track.

These men he identified the next day when they were under arrest, and the appellant offered to prove by the record of the Circuit Court of Marion County, that they were indicted and convicted, and sent to the penitentiary for the murder of the said Patrick Quirk, by causing the said wreck, by so interfering with the track.

This record the court excluded, and as we think, properly, because of the difference between the parties to that proceeding and this.

After carefully considering all the evidence and the briefs of counsel, we are of opinion that the appellee failed to show that appellant was negligent in respect to the condition of its tracks, and that appellant satisfactorily proved that the wreck was caused, not by its negligence, but by the unlawful act of other parties, in loosening the rail as above described.

We think there is no room for doubt on these points, as the record now appears, and that the verdict was so clearly against the proof that it was the duty of the Circuit Court to grant a new trial. For the error in this respect the judgment will be reversed and the cause remanded.

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70 150

P. W. Harts v. Rose H. Fowler, for use, etc.

1. **GUARANTOR**.—*When Not Liable*.—If the principal is not liable, the guarantor will not be.

Memorandum.—*Assumpsit*. Appeal from the Circuit Court of Sangamon County; the Hon. JESSE J. PHILLIPS, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded with directions. Opinion filed November 4, 1893.

The opinion states the case.

CONKLING & GROUT, attorneys for appellant.

BROWN, WHEELER & BROWN, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was rendered against the appellant as guarantor for Hattie B. Harts, upon a contract which was before this court in the case of Hattie B. Harts v. Rose H. Fowler, use, etc. We decided, in an opinion filed at this term in the last named case, that liability to pay certain interest claimed, did not arise against the maker of the contract. The judgment against the appellant, in the case at bar, is for the same alleged liability upon the same contract as guarantor for the maker.

If the principal is not liable, the guarantor would not be; hence the judgment herein must be reversed; but as we held that judgment should have been rendered against the principal maker of the contract for the sum of \$3,015.66 with interest from the 2d day of January, 1892, at five per cent, and remanded the case against her with directions to

Spindler v. The People.

the Circuit Court to enter such judgment, this case must be and is remanded with directions to the Circuit Court to enter like judgment against the appellant herein. Reversed and remanded with directions.

John Spindler, Francis Meharry and H. H. Atwood,
Sureties on the Bond of Merton Dunlap, County
Clerk, v. The People of the State of Illinois,
for use of the County of Ford.

51 613
164 637
51 612
76 663

1. SURETIES—*Defenses on Official Bonds.*—In an action upon the official bond of a county clerk for fraudulently issuing orders, etc., the sureties can not be heard to make the defense, that, but for the negligence of the treasurer, and the failure of the board to compare the orders with its files and records, the fraud could not have been successful.

Memorandum.—Debt on official bond. Appeal from the Circuit Court of Ford County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 8, 1893.

The opinion states the case.

ALFRED SAMPLE, *pro se*, C. H. YEOMANS, E. C. GRAY, and F. H. MOFFETT, attorneys for appellants.

COOK & MOFFETT, attorneys for appellee.

PER CURIAM.

This was an action on the official bond of Merton Dunlap, as county clerk of Ford county, for the term of four years, beginning the first Monday in December, 1886, and ending the first Monday of December, 1890. The sureties only were served with process and the principal did not appear.

The case was tried before the court without a jury by consent and resulted in a finding for the plaintiff, the damages being assessed at \$4,571.35. Judgment was accordingly.

The plaintiff's claim comprised four classes :

1st. Fees received by the clerk during his term of office and not accounted for in his semi-annual reports, \$378.38.

2d. Allowances made him by the board for services rendered the county, which he never accounted for in his semi-annual reports, \$572.99.

3d. For orders issued by Dunlap payable to himself, in excess of allowances made to him by the board, \$2,530.48.

4th. For orders issued by Dunlap to other parties without authority from the board, which orders were paid to him, \$634.57.

And for orders issued by Dunlap to other parties in excess of amounts allowed to them, which excess of orders Dunlap collected and converted to his own use, \$454.83.

It is conceded that for the first class the appellants are liable.

As to the second class it is contended, as it was in the case preceding, *James Y. Campbell et al. v. The People, etc.*, that the sureties are not liable, because when the several allowances were made there was no general balance due from the county to the clerk, his settlements having been regularly made semi-annually, as by law required, and the balances then found due having been adjusted. It is not necessary to repeat the views expressed in that case on this point. For the reasons there stated, the objection is regarded as untenable.

As to the items embraced in the third and fourth classes, the difference is that in the one the orders were payable to the clerk, and in the other they were payable to other parties.

These were all improperly issued and it can not be denied that the clerk was guilty of a breach of duty in that respect. It is argued here, as it was in the *Campbell* case, that as the orders were not countersigned by the treasurer they were improperly paid by him, hence the sureties are not liable; and that as to those which were not payable to the clerk but to third parties, the treasurer was further at fault, as he should have paid them only to the payees named. It appears that it was customary for the clerk to deposit the

Nappin v. Abbott.

orders at the bank of Blackstock & Co., where the treasurer kept his funds, and the bank would pay the money to Dunlap, he claiming as to those not payable to him that he was the agent of the payees. The bank would at intervals receive checks from the treasurer for the amount of orders so received and on hand and he would report the orders to the county board in his next semi-annual statement, and the overissue not then being detected, the board would approve the report and destroy the orders.

Admitting that, but for the negligence of the treasurer, and the failure of the board to compare the orders with its files and records, the fraud could not have been successful, yet we hold here, as we did in the Campbell case, that no defense thereby arises to the sureties.

Perhaps the board might have made the discovery by the use of more care, but the conduct of the clerk was skillful as well as criminal, and the board had no suspicion. The prime cause of the loss was the gross malfeasance of the clerk in the course of his official action.

The sureties can not be heard to make this defense.

In this case, as in the preceding, the orders were in effect payable to bearer, and the clerk seems to have had a general authority from persons having claims allowed against the county to collect and remit. What we said on this point in the preceding case of Campbell et al. v. The People, is applicable here.

Without going further into details, or making special reference to all the points discussed in the briefs, we are of opinion the judgment should be affirmed.

David Nappin v. John Abbott.

1. *MISTAKES—Principal Liable for Mistakes of Agent.*—A principal is liable for the mistakes of his agents made in the line of his employment.

Memorandum.—Trespass for taking personal property. Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge,

presiding: Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The statement of facts is contained in the opinion of the court.

GRAY & WAGGONER, attorneys for appellant.

D. ABBOTT, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This case originated before a justice of the peace and was removed by appeal to the Circuit Court, where, by agreement, the issues were submitted to the court, a jury being waived, resulting in a finding and judgment for the plaintiff for fifty dollars, from which judgment the defendant has prosecuted an appeal to this court. The plaintiff had sold the defendant a thoroughbred Hereford bull calf and a heifer of the same breed for the sum of \$92.50.

The male animal was designated, but the heifer was to be selected by the defendant, he to have his choice of two owned by the plaintiff. These heifers the defendant had never seen. The plaintiff sent him word to come and get the animals, and he went accordingly on the day named. The plaintiff was not present but had instructed his hired men to meet the defendant and give him the stock. These hired men testify that they did not know which were the thoroughbred heifers, but the defendant professed to know and made his selection without anything said or done by them. He testified that he did not know, or assume to know, and that they pointed out two heifers as the thoroughbreds, and he selected one of them, and it, together with the male, was driven to his premises. It was a part of the contract that the plaintiff was to furnish a pedigree, showing the animals to be thoroughbred. The next day after the defendant got the animals, the heifer died, and then it was ascertained that she was not one of the thoroughbreds, and was therefore not one of the animals which the plaintiff intended to sell and he intended to buy. The plaintiff sued for the value of the bull under the con-

L. E. & W. R. R. Co. v. Sellman.

tract, and for the value of the heifer taken from his premises, upon the theory that the defendant was a trespasser in so taking her, and was responsible for her safe keeping and return.

The defendant's testimony was clearly to the effect that he took the heifer under a mistake on his part and no less so on the part of the agents for the plaintiff.

In other words, that it was the mistake of plaintiff's agents in pointing out this heifer as one of the thorough-breds which induced him to select her.

She was a large fine animal but not a pure blood.

It is true the hired men testify the other way, but as defendant states, and not denied by the plaintiff, the latter was surprised when he learned of the mistake, and said that one of the men, naming him, knew better. At any rate it was a question of fact for the court sitting as a jury to determine whether the defendant's action was induced by the action of the plaintiff's agents. If it was, then the defendant could not be held as a trespasser, and was not responsible for the loss of the heifer unless caused by some act or neglect of his, which does not appear.

In the absence of anything to the contrary in the record, we are to presume the court properly applied the law to the facts, and the finding as to the latter must have the same weight as the verdict of a jury. Hence, in view of the conflicting evidence, we are not prepared to hold that the finding is wrong.

The judgment must therefore be affirmed.

Lake Erie & Western Railroad Co. v. W. E. Sellman.

1. *RES ADJUDICATA*.—*Where it Does Not Apply*.—The doctrine of *res adjudicata* does not apply where there is no final operative judgment. So held where a judgment from a justice of the peace was suspended by the taking of an appeal, and the suit was dismissed before a trial on the appeal.

VOL. 51.]

L. E. & W. R. R. Co. v. Sellman.

Memorandum.—Action of case against a common carrier for damage and loss of goods. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

The opinion states the case.

APPELLANT'S BRIEF, A. E. DEMANGE, ATTORNEY; W. E. HACKEDORN, OF COUNSEL.

The principle of *res judicata* extends not only to the questions of law and fact which were decided in the former suit, but also to the grounds of recovery or defense which, under the issues, might have been but were not presented, and both parties and privies are bound. *Harmon v. Auditor*, 123 Ill. 122; *Litch v. Clinch*, 35 Ill. App. 657; *Bennett v. Star Mining Co.*, 119 Ill. 10.

While it is true that a plaintiff may maintain several actions against a number of persons who commit a tort jointly and may recover several judgments, he can have but one satisfaction. *Severin v. Eddy*, 52 Ill. 191.

A prior adjudication of the same subject-matter between the same parties or their privies operates as an estoppel upon the parties against subsequent litigation, at least as to all matters that were actually in controversy and decided in that adjudication. *Moore v. Williams*, 232 Ill. 590.

EDWARD BARRY, attorney for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

August 11, 1891, appellee brought this action on the case for damage and loss of goods alleged to have been caused by negligence of the carrier. A trial by the court without a jury resulted in a finding and judgment thereon for plaintiff for \$60. After the usual motions entered and overruled, defendant appealed.

On the 15th of July appellee shipped a lot of household goods, clothing and other articles from Ottawa to Bloomington, via Peoria, over the roads of the C., B. & Q., and the

appellant companies. At Ottawa he received from the first mentioned company a bill of lading containing a clause expressly limiting the liability of that company to loss arising on its line. Among the goods so shipped was a zinc-covered trunk, locked and with a clothes line tied around it, containing wearing apparel of appellee and of his wife and child, which on said bill was mistakenly listed by the company's agent as a chest of tools. Appellee did not see the goods from the time they were delivered to the company at Ottawa, until they arrived at Bloomington, about a week later, when it was discovered that some were damaged and others were missing. For this loss and damage, after some fruitless negotiation, he brought suit against the Burlington Company before a justice of the peace, in Peoria, and obtained a judgment, from which the company took an appeal to the Circuit Court. On the 9th day of May, 1892, that case, pending the appeal and after this action was brought, was settled without trial, for less than half the amount of the judgment appealed from, by an agreement in writing between the parties, which released the Burlington Company but expressly stated that the plaintiff did not release any claim he might have against the appellant here; and that suit was accordingly dismissed.

The main point urged for the reversal of the judgment below, and which is learnedly and ingeniously presented, is that the doctrine of *res adjudicata* applies and bars a recovery. It is said that in that suit against the Burlington Company the plaintiff prosecuted for the same causes of action that are involved in this, and has had satisfaction; though it is conceded that if he knowingly assented to the limitation of the liability of the Burlington Company expressed in the bill of lading, and had not received from that company satisfaction for all the damages and loss of goods in their transit from Ottawa to Bloomington, he might recover in this case for any resulting from the negligence of appellant.

We think the technical doctrine of *res adjudicata* does not apply, because there was no final operative judgment

against the Burlington Company. That of the justice of the peace was suspended by the appeal taken, and the suit was dismissed before trial on the appeal.

Nor do we understand the evidence as showing or tending to show that the settlement was for any damage other than that which occurred on the Burlington road. The agreement for settlement expressly negatives that proposition. It may be presumed that that agreement on the part of the plaintiff, which was to settle with the defendant and release it for so much less than the amount of the judgment appealed from, was induced by his belief, either from the evidence produced on the trial or facts that afterward came to his knowledge, that the larger portion of the loss and damage occurred on the road of this appellant. There was evidence on the trial of this case that the trunk was received at Peoria and there delivered to the appellant company in apparently good order, but when it arrived at Bloomington the lock had been broken, the trunk opened and the contents taken away. Young, the drayman in the employ of Boyce & Son, to whom it was delivered by the company's agent, called his attention to the fact, but was told by the latter to go ahead and load it. These contents were wholly lost to appellee, and the testimony as to their value fully warranted the amount of damage found by the court below.

We see no material error in the record, and the judgment will therefore be affirmed.

Joseph Faith v. Frank Yocum.

1. POSSESSION—*Holding Without a Title—Extent of Possession.*—The possession of a person in the occupancy of premises without title extends only to the lands actually occupied by him.

2. TRESPASS TO REAL ESTATE—*Right of Action in the Owner of the Fee.*—The right of action for damages resulting from a trespass is in the owner of the fee at the time and is not assigned by a subsequent conveyance of the land.

Faith v. Yocum.

3. STATUTE OF FRAUDS—*Parol License to Cut Timber*.—If an owner gives a parol license to cut timber on his land it will protect the licensee against the owner and his grantee with notice. It is not within the statute of frauds, for no interest in land is involved.

Memorandum.—Assumpsit for goods sold and delivered. Appeal from the Circuit Court of Sangamon County; the Hon. JESSE J. PHILLIPS, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed December 12, 1893.

The opinion states the case.

B. GALLIGAN and PALMER, SHUTT & DRENNAN, attorneys for appellant.

M. U. WOODRUFF, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT

The appellee recovered a judgment against the appellant for the sum of seven dollars, for one hundred fence posts sold and delivered.

The defense was that the posts were cut in part on the land of the appellant and that the damages thereby occasioned were equal to the demand sued for.

At the time the alleged trespass was committed, the title to the land was not in the appellant, nor does it appear that he was in possession. He had an equitable title, but no legal title, and had not the actual possession of the land on which the trees were cut. Hence, being without a title, his possession extended only to the land he actually occupied. *Davis v. Easley*, 13 Ill. 192; *Goewey v. Urig*, 18 Ill. 238; *Fisher v. Bennehoff*, 121 Ill. 426.

The right of action for the damages resulting from the trespass was in the owner of the fee at that time and was not assigned by a subsequent conveyance of the land to the appellant. *C. & A. R. R. Co. v. Maher*, 91 Ill. 312.

But the case was tried upon the theory that the question was whether the owner of the land had given the appellee the right to cut the timber before he conveyed to appellant's grantor, and whether the latter and the appellant had notice of the same before they became interested in the land.

On this point the evidence was conflicting and the jury found for appellees. The trouble grew out of the fact that an old fence was supposed to be the line, and the appellee had bought the right to cut the timber east of the fence. A subsequent survey placed the line east of the trees in question. If the owner gives a parol license to cut timber on his land, it will protect the license against the owner and his grantee with notice. It is not within the statute of frauds, for no interest in land is involved. 3 Kent's Com. 452; Williams v. Flood, 63 Mich. 48; Claffin v. Carpenter, 5 Metc. 580; Parsons v. Smith, 5 Allen, 578.

The court properly instructed the jury. The motion for new trial was mainly pressed because of newly discovered evidence.

The alleged evidence was merely cumulative, not conclusive. The alleged ground of surprise as to the testimony of appellee was not sufficient. The judgment will be affirmed.

Charles Buhl v. S. D. Noe.

1. REAL ESTATE AGENT—*When Entitled to His Commission.*—When the owner contracts with a broker to sell his property upon a commission, no price being fixed, and the broker produces a buyer with whom the owner negotiates and finally a sale is effected, the broker is entitled to his commission.

2. REAL ESTATE AGENT—*When Not Entitled to His Commission.*—When the owner contracts with a broker to sell his property upon a commission, a price being fixed, and the broker fails to produce a buyer, and the owner, in order to effect a sale, is compelled to negotiate with an adjoining owner and sell in connection with such adjoining owner at a reduced price, the broker is not entitled to his commission.

Memorandum.—Assumpsit for broker's commissions. Appeal from the Circuit Court of Vermillion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1893. Opinion filed November 4, 1893.

The opinion states the case.

CALHOUN, STEELY & JONES and W. R. LAWRENCE, attorneys for appellant.

Buhl v. Noe.

SALMANS & DRAPER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff below recovered a judgment for \$375 for commissions on the sale of real estate, from which defendant prosecuted an appeal to this court.

The declaration as originally filed contained a single count in *indebitatus assumpsit* for commissions on the sale of a certain parcel of ground situate, etc.

After a verdict and pending motion for new trial, the plaintiff obtained leave to file an amended declaration, in which it was alleged that the plaintiff was a real estate broker in Danville; that he entered into an agreement with the defendant to sell the property for him upon a commission of 5 per cent on the first \$1,000 and 2½ per cent on the residue; that by the contract the plaintiff was to plat the property at his own expense and to send the plat with a sealed bid to the U. S. Treasury Department at Washington; that the price to be asked was \$15,000, and that the plaintiff did make the plat and send it with the bid to said department; that the agent of the government came to Danville and that the plaintiff opened negotiations for sale, and while said negotiations were pending, defendant offered the premises at a less price, to wit, \$14,000, which was by the government accepted and the sale made at that price, whereby the defendant became liable for the commissions at the rate above alleged.

It is urged that the court erred in permitting the declaration to be amended after verdict. The practice act, Sec. 24, is authority for such permission and it does not appear that the rights of the defendant were unduly prejudiced by the amendment. It was clear that the evidence offered by plaintiff did not support the original count, but it was not objected to on that ground and it was therefore proper to allow an amendment.

A more important and difficult question is whether the evidence supported the new count, and whether the facts proved entitled the plaintiff to recover.

It appears that the government had asked for sealed bids for a lot of ground in the city of Danville, on which a public building might be erected, and that the plaintiff proposed to the defendant to offer a lot belonging to the latter. The matter was discussed somewhat and, as the plaintiff states, the defendant finally authorized him to plat the ground and offer it for \$15,000, and was to pay commissions at the rate specified in case of a sale at that price. The government agent visited Danville not long afterward, and the plaintiff learning he was there, called on him and showed him the property.

It appears that the lot was not of sufficient size, and that in order to meet the requirements of the government, the defendant made an arrangement with the owner of adjoining property by which the necessary quantity was obtained, and the defendant received \$14,000 for his property under such arrangement.

In making this arrangement the defendant allied himself with another real estate agent, and it is quite probable he was compelled to do so in order to get his property into the deal, and in so doing he wholly ignored the plaintiff. Thus it seems that all the plaintiff did was to plat and offer the property at a price which was not obtained, and presumably was not obtainable, and that the property could not have been sold to the government at any price without the parcel of adjoining property, which was necessary to make up the amount of ground required. If the plaintiff's contract was to sell the property at the price fixed, \$15,000, then he could claim his commissions only in the event of such a sale, or in the event that having produced a buyer able and willing to buy at that price, the defendant, knowing the fact, sold the property at a lower price. Such action of the owner, knowing the facts, would be a waiver of the condition as to price, and would entitle the agent to his commissions. *McArthur v. Slawson*, 53 Wis. 41.

It is possible the government would have paid \$15,000 for the defendant's property had it been of the proper quantity; but the evidence is quite satisfactory that, without the ad-

joining strip, it would not have taken it at any price, and there is no proof that in any event it would have paid that sum for it.

The court gave the following instructions, at the instance of the plaintiff:

"3. The court instructs the jury that where the owner of real estate puts the same in the hands of an agent to sell on commission, and the agent brings the owner and purchaser together, and they then continue the negotiations and consummate the sale, the agent is entitled to his commission, even though the owner, in order to make the trade, agreed with the purchaser to take a less sum than was at first given to the agent.

4. The law requires the owner of land to deal fairly and honestly and in good faith with an agent in whose hands he has placed his real estate for sale; he will not be permitted to dismiss or discharge his agent after a purchaser is found and negotiations are put on foot, and then conclude the trade himself and escape the payment of commission.

5. In weighing the evidence, you have a right to consider all the facts and circumstances in evidence in this case, and the demeanor of the witnesses and their appearance while testifying, their means of knowledge, and the reasonableness of their stories, or the unreasonableness of the same; and if, after hearing all the evidence, you can say you believe, from a preponderance of the evidence, that the defendant put his real estate into the hands of the plaintiff for sale, and that the plaintiff brought the purchaser and defendant together, and that as a result the defendant sold the real estate in question to the buyer with whom plaintiff had started negotiations, then and in that case your verdict should be for the plaintiff for whatever amount you may find due him, according to the contract between them, if you find there was such contract."

These instructions all ignore the fact that the contract required the plaintiff to produce a buyer able and willing to pay the price fixed, \$15,000; or at least they assume that it was not important that the purchaser was able and willing

to buy at that price, and that if a sale resulted, no matter on what terms, the plaintiff was, under the contract, entitled to his commissions.

For the sake of selling at that price the defendant might have been willing to pay the commissions; but if he had to sell at a less sum, or not at all, he might have preferred not to sell, if he would have to pay commissions on the lower and only obtainable sum.

As applied to the case made by the proof, these instructions were calculated to mislead the jury. They ignored the fact that the defendant was compelled to ally himself with the owner of the adjoining property in order to effect a sale of his, even at the price of \$1,000 less than that fixed by the contract. Having such a contract, it was necessary for the plaintiff to show that after he had produced a buyer able and willing to take the property at the price fixed, the defendant, knowing the fact, voluntarily sold the property at a lower price. When the owner contracts with a broker to sell his property upon a commission, no price being fixed, and the broker produces a buyer with whom the owner negotiates, and finally a sale is effected, the broker is entitled to his commission; but such we do not understand was the case here, and it was error to so assume in the instructions. It may be insisted that it was not incumbent on the plaintiff to find a purchaser able and willing to pay the fixed price of \$15,000 for the property, but we think the case as made by the proof is such that the court could not properly so assume, as it did, in the instructions above quoted.

The judgment will be reversed and the cause remanded.

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**Springfield City Ry. Co. v. William Clark, John Ritter
and John Foster.**

1. **COMPARATIVE NEGLIGENCE—*Ordinary Care.***—The rule of comparative negligence can not be invoked by a plaintiff unless he establishes affirmatively that he himself was in the exercise of ordinary care.

2. **ORDINARY CARE—*The Term Defined.***—Ordinary care is such

Springfield City Ry. Co. v. Clark.

care as a reasonably prudent person adopts for the security of his person or property to avoid injury.

Memorandum.—Action of case for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JESSE J. PHILLIPS, Judge, presiding. Heard in this court at the May term, A. D. 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

CONKLING & GROUT, attorneys for appellant.

PATTON & HAMILTON and JAMES M. GRAHAM, attorneys for appellees.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

These were actions on the case for injuries to persons and property, respectively, resulting from a collision between a car of appellant and a carriage of which appellee Clark was driver and Foster the owner, and in which Ritter was riding as a passenger.

The accident occurred about half past ten o'clock in the night of January 19, 1892, at the crossing of Edwards and Spring streets in said city. The car was going north on Spring and the carriage west on Edwards.

By stipulation of counsel they were tried together and only one bill of exceptions was prepared.

Upon the general issue the jury found for the plaintiffs and assessed the damages of Clark at \$800, of Ritter at \$400 and of Foster at \$300. Motions for a new trial in each were overruled and judgments entered on the verdicts, respectively.

The errors assigned and argued are that these verdicts were against the law and the evidence, that the damages assessed were excessive, and that the court erred in giving and refusing instructions.

It was a cold and clear but moonless night. Snow had fallen during the day and had thawed, but the rails were icy, a condition which made them very unreliable with refer-

ence to stopping or slowing the car. The wheels, though not turning, would slide. As to the rate of speed at which it was going, the testimony conflicted, ranging from seven to eighteen or twenty miles per hour.

On the south side of Edwards street, some twelve or fifteen feet from the corner of Spring, there was a watering trough where a team was standing, to avoid which the carriage was turned north and was crossing Spring in a north-westerly direction. The driver's back was therefore toward the south, from whence the car was coming. At the southwest corner of the crossing was a building nearly one hundred feet long on Edwards street which obstructed the view of Spring street, south, until it was passed. The driver stated that there was no car north, to which he looked, that he heard no signal of any coming from the south before he passed the corner, and that he looked as soon as he could, but did not see it. Spring street is only sixty-six feet in width, and the car track, four feet eight and a half inches wide, is in the middle of it, making the east rail but a little over thirty feet west of the east line of Edwards, on which he was driving. He had, therefore, hardly passed the corner so as to be able to see south, before his horses were at the track. They were going at the rate of five or six miles per hour. He says he first observed the car when it was from seventy-five to one hundred feet south of him when his horses were on or at the rail and he was unable to back; that he thereupon hallooed to the motorneer to stop or slow up his car, but no attention being paid to it he whipped up his horses in hope of getting across before it could reach him. There was no one inside the car but the conductor, who was then attending to the stove. Clark and Ritter testified that the motorneer was not looking forward along the track but standing sideways, toward the west, and batting his hands as if to keep them warm, and that immediately upon Clark's hallooing he turned his back to the front and looked into the car. It struck the hind wheel of the carriage throwing it twenty feet or more against a telephone post, and ran on at least one hundred and fifty feet before it was stopped.

From the evidence in the record we are not prepared to say the jury over-estimated the damages to the carriage or to its driver or the passenger.

Both the conductor and motorneer testified that the bell was sounded for Edwards street, but the driver and passenger, who were listening for it, and two others of the six witnesses who observed the collision, say they did not hear it.

Thus the evidence upon the question of care or negligence on the part of the motorneer and that of the driver, upon whom the rights of the plaintiffs respectively depend, was conflicting, as is usual in such cases.

It must be conceded there was a failure to use ordinary care by one or both of these men. Such a collision could hardly have occurred upon any other supposition; considering the time and kind of night, the condition of the rails, the narrowness of the street and the obstruction of the view south from Edwards street by the long house on the corner, it might well be doubted whether an ordinarily careful motorneer would approach such a corner at an unusually high rate of speed, without notice by some sound signal, looking in another direction and without having in hand the means provided for regulating the movement of his car, but giving attention only to his own personal comfort. There was evidence tending to prove that such was the case with this motorneer on that occasion.

So also it might well be doubted whether an ordinarily careful carriage driver would drive west, on Edwards, upon the track, without availing himself of the earliest opportunity, after passing the obstruction to his view by the long house, to look south for a coming car. There was some circumstantial evidence tending to prove that Clark did so on this occasion. That is the only fault charged to him, unless he did see the car in time to stop his carriage and so avoid the collision, but recklessly undertook to cross ahead of it. He positively denied that he saw the car in time to avoid it, and as to that was not contradicted, even circumstantially. If he failed to look, which he also denied, the question would arise whether such failure was explained and measurably

excused far enough to relieve him from the charge of failing to use ordinary care, by reliance upon the absence of the signal for which he listened, if he did listen and it was not given, the diversion of his course by the team at the trough, and proper attention to his horses, then going north of west. This, with the other controverted questions of fact, was for the jury.

It was their province to find the facts from the evidence and also to determine whether those facts were or were not, as to each of the parties, consistent with the exercise of ordinary care; and unless there was error on the part of the court materially contributing to it their finding should be conclusive. Five instructions were given for the plaintiff. The first three in relation to negligence and care on each side, and the remaining two upon the measure and elements of damages. Each of the former is complained of.

It is said that in the first the court attempted to state the rule of comparative negligence, but omitted the requirement of ordinary care on the part of the plaintiff, which is true as far as it goes; however, it is repeated in the second given for defendant, with this addition: "Yet if they further believe from the evidence that the driver, Clark, was guilty of negligence which contributed to the collision, then the plaintiff can not recover unless the jury believe from the evidence that the negligence of the defendant was gross and that of the driver, Clark, was slight in comparison with that of the defendant; and if the jury believe from the evidence that Clark was not in the exercise of ordinary care and caution in approaching and crossing the track, then he was guilty of negligence which was not slight and plaintiff can not recover." There is no necessary inconsistency in these instructions. The addition to defendant's defines slight negligence, used in plaintiff's, as being greater than is consistent with the exercise of ordinary care, and makes the exercise of at least such care on the part of the driver essential to the right of plaintiff to recover. Each of the two others given for plaintiff also plainly require that degree of care to entitle him to a verdict. The third for defendant

strongly announces the same requirement and furnishes a definition of ordinary care; and the first is to the same effect, without the definition. Taken together, these instructions state the rule of law so fully and clearly that the jury could not have been misled by the omission from plaintiff's first. They do not present a case of contradictory instructions in which the jury might as well follow the one as the other. *Willard v. Swanson*, 126 Ill. 381.

The second and third given for plaintiff are objected to as tending to confine the attention of the jury to the conduct of the driver at the moment of collision, without reference to the question of care or negligence in his conduct preceding it. This objection is founded, as to the second, on the phrase, "You should take into consideration the situation and conduct of both parties at the time of the alleged injuries." In support of it some cases are cited in which the Supreme and Appellate Courts have disapproved of instructions they thought to have this tendency. *I. C. R. R. Co. v. Waldon*, 52 Ill. 294; *C., B. & Q. R. R. Co. v. Sykes*, 1 App. 527; *C. & N. W. R. R. Co. v. Clark*, 2 Id. 122; *C., B. & Q. R. R. Co. v. Colwell*, 3 Id. 549. The instructions in question in these cases were more open to criticism on this ground than the one here under consideration, and yet as to some of them we should be disposed to say with the Supreme Court in *L. S. & M. S. Ry. Co. v. Johnson*, 135 Ill. 652-3, "it was hypercriticism," and to put a somewhat higher estimate upon the intelligence of juries. The institution would be hardly worth preserving, if in any such body of twelve men there should not be found some of sufficient sense and influence to prevent such a misconstruction. We have not the slightest doubt that in this case the jurors as well as the counsel discussed and considered the conduct of the driver in approaching the point of collision. It will be observed that the instruction requires their consideration of the situation and conduct of both parties at the time of the alleged injuries. If they were limited to the *punctum temporis* the instant of collision, as to the driver, they were so also as to the motorneer, and such a limitation would have been quite

as favorable to defendant as to plaintiff and absurd as to both. But there was no such understanding. If the instruction, considered by itself, could have caused it, the possibility was removed by those given for defendant, the second and third of which required due care by Clark "in approaching and crossing" the track. *L. S. & M. S. R. R. Co. v. Johnson, supra.*

This objection, as to the third of plaintiff's instructions, rests upon what seems to us a misapprehension.

That instruction was as follows: "It is the duty of the defendant by its agent or servants to use reasonable care to see vehicles which may be passing across its tracks; and if you believe from the evidence that the motorneer of the defendant did not use ordinary care to observe Clark while he was passing across the track of the defendant upon a public street, and that if said motorneer had used such ordinary care, he could have seen the carriage in time to have stopped his car or slackened its speed so as to have avoided injury to said carriage and Clark and Ritter, and that the plaintiff, while using ordinary care, was injured as charged in the declaration on account of such neglect, the jury must find a verdict for the plaintiff."

The third count of the declaration in Clark's case alleges that defendant's servant, by the exercise of ordinary care, could and should have seen the carriage, and stopped or slackened speed so as to avoid injury to the carriage crossing the track; but not regarding its duty, defendant did not see it, or stop or slacken the speed of the car, and the collision and injury resulted.

The preceding counts respectively charge defendant with negligence while plaintiff was approaching the track, namely, running the car at a dangerous rate of speed, and not ringing a bell, sounding a whistle or giving some signal or warning of its approach. But the third was directed against its negligence after he had reached it, namely, in not seeing the carriage in time, and stopping or slowing up so as to avoid the injury.

The third instruction had reference to the charge in this

count, and therefore properly directed the minds of the jurors to the time "while he was passing across the track," which is the phrase upon which the objection rests. Whatever other fault it may have, we think it not chargeable with the one here alleged.

By several instructions asked by the defendant it was declared to be the law, that if the driver, "by looking or listening" could have seen the car and avoided the collision, the plaintiff could not recover; but the court modified them by substitution for the words quoted the phrase "by the exercise of ordinary care;" and this modification of them is urged as error. Citations are made from Booth on the Law of Street Railways (p. 432, Sec. 315), and a number of decisions by the Supreme Court of Pennsylvania, in support of this contention, and it is earnestly argued that the new conditions consequent upon the introduction of cable and electric cars for street railways in the cities and larger towns require the application of this rule.

The question has not before arisen for decision in this State. We are not prepared to adopt it in advance of a decision by the Supreme Court or some act of the legislature, against the oft repeated holdings that negligence is a question of fact, except where some positive duty imposed by statute has been disregarded or the act or omission in question is such that universal and instant judgment would unhesitatingly pronounce it negligence. If it admits of honest difference of opinion it must be submitted to the jury.

Some other points are urged in the argument for appellant which we deem unnecessary to notice.

On the whole, we think there is no substantial ground for complaint of the action of the court or of the finding of the jury and the judgments in the several cases respectively will therefore be affirmed.

Joel S. Kelly v. Shumway & Johnson.

1. *AGENCY—Evidence of.*—Upon a controversy as to the existence of an agency, testimony showing that the party contesting the same said he intended to take his business out of the insisting party's hands, is competent.

2. *MOTION FOR A NEW TRIAL—Requisites—What Must Be Pointed Out.*—Error in giving instructions must be pointed out in the motion for a new trial. It comes too late in the Appellate Court.

Memorandum.—Assumpsit for commissions on the sale of real estate. Appeal from the Circuit Court of Christian County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

REDFERN'S TESTIMONY.

I reside in Buckhart township, and know the parties to this suit. I know the farm owned by Kelly, east of Taylorville. I had a conversation with Shumway & Johnson about August, before the farm was sold to Stine, about purchasing the farm.

Counsel for defendant: We insist they were not our agents, and object.

By the Court: I am of the opinion the testimony may go to the jury. I do not pass upon what testimony is in. I am of the opinion the color line has passed. (Counsel for defendant excepted.)

They had the Kelly farm for sale. I came and saw them and asked about the farm. Shumway & Johnson priced the farm to me at \$55 an acre. After I looked at it I told Johnson I would take it at \$55. They then telephoned Kelly they had sold his place at his price. I do not know what Kelly replied; I don't remember what Johnson replied; Johnson spoke something to me about going down to see Kelly. I didn't really tell him I would go. I went to see Kelly but did not tell him that I had been trying to buy the farm; I asked him his price; he told me \$55 an acre. I told I would take it at that figure. He said he would have to see Shumway & Johnson; he wanted to remove the sale out of their hands. He said he was coming to Taylorville that evening to remove the farm out and let me have it at their price. When he came here that evening I found him and the gentleman who bought the farm. I spoke to Kelly at the corner where he and this fellow were in conversation. I was ready to take the farm and had arranged with father for the money. I did not get the place, and I understand Kelly sold that evening to Stine.

Plaintiffs' third and sixth instructions assigned for error:

8d. If you believe from the greater weight of the evidence that the

Kelly v. Shumway & Johnson.

plaintiffs did at any time, when they had, by a then existing contract, authority to sell the farm in question, procure a purchaser or purchasers who accepted all the terms and conditions upon which they held said farm for sale, and the said purchaser or purchasers were at the time willing, ready, and able to comply with all the terms and conditions upon which the said farm was held for sale, then the plaintiffs would be entitled to their commission or fees in such sum as the evidence shows they were to receive, if any; and in such case your verdict will be for the plaintiffs.

8th. If the jury believe from the evidence in this case, that the evidence fails to show by the greater weight thereof, that at a time when there was an existing contract between plaintiffs and defendant, authorizing the plaintiffs to sell said farm, that the plaintiffs did procure a purchaser or purchasers who accepted all the terms and conditions upon which said land was held for sale, and who were at the time willing, ready and able to comply with all such terms and conditions, then the plaintiffs will not be entitled to any commissions or fee, and in such case your verdict will be for the defendant.

TAYLOR & ABRAMS, attorneys for appellant.

JOHN E. HOGAN and JOHN G. DRENNAN, attorneys for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$100, for commissions upon the sale of real estate.

The questions of fact as to whether plaintiffs were authorized by the defendant to sell his farm, and whether they produced a buyer who was able and willing to take the property on the defendant's terms, were found by the jury for the plaintiffs. Admitting there is considerable conflict upon material points, yet we find no such want of proof nor such preponderance against the verdict as to warrant reversal.

The objection based upon the admission of the testimony of Redfern, is, we think, not well made. The important feature of his testimony was the statement by defendant tending to show that the plaintiffs were his agents in respect to the sale of this land, and this, of course, was competent.

The conversation with plaintiffs and their action in there-upon communicating with the defendant by telephone, were

merely preliminary to the interview the witness had with the defendant, and were properly shown in order to make more clear and intelligible what followed.

The objection to the third and sixth instructions must also be overruled. It is urged that the court in these instructions assumed there was an existing contract of agency.

This is a misapprehension. The statement in that respect is hypothetical and could not fairly be understood otherwise.

This view is strengthened by other portions of the charge, wherein it was laid down as a part of plaintiffs' alleged case, that there was such agency, and that it devolved upon the plaintiffs to prove every material allegation by the greater weight of the evidence.

In the motion for new trial it was not pointed out that the court erred in the instructions, and therefore the present objection comes too late.

No other points are presented in the brief. The judgment is affirmed.

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Henry T. Ellis and Thomas H. Ford v. Elizabeth E. Petty.

1. **ESTOPPEL**—*Of Bailee*.—A person having received property from another as bailee or trustee, can not be heard to say that the property was not the property of such person.

2. **FRAUDULENT TRANSFERS**—*By Whom Impeached*.—A transfer of property by a person in his life may be impeached by creditors if it was a fraud upon them, but not by the administrator of such person. Subject to the rights of creditors, the title of the transferee is good.

Memorandum.—*Assumpsit*. Appeal from the Circuit Court of Vermillion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 4, 1893.

The opinion states the case.

SALMANS & DRAPER and R. W. FISK, attorneys for appellants.

Ellis v. Petty.

MABIN & LORD and H. C. ELLIOTT, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment for \$965.65 against the appellants. The cause of action alleged may be briefly stated. The husband of appellee transferred to her certain money, notes and personal property, and soon after died, leaving his estate in a somewhat complicated condition. After his death, appellants received said money, notes and personal property from appellee, upon the trust to convert the same into money and apply the proceeds upon the debts of the deceased husband.

Appellee became dissatisfied with their course of proceeding, caused an administrator to be appointed, and brought this suit for the value of the assets so placed in their hands, which, as she alleged, they had failed to apply according to the agreement. It is now contended on behalf of appellants that the evidence fails to show the alleged misapplication.

We find much conflict in the proof, and much difficulty in reaching a satisfactory conclusion. The difficulty is increased by the imperfect way in which the abstract of appellants presents the testimony.

An abstract by appellee also has been filed, and after giving both these a full examination with same references to the record, we can not say the verdict is so strongly against the weight of the evidence as to warrant a reversal for this cause. Two juries have found the same way in the case, the last verdict being considerably larger than the first, and we are inclined to think the only serious question of fact is as to the amount of the damages.

The Hughes notes, amounting to some \$1,500, were scaled down to less than \$500, upon a settlement made by the appellants with Hughes, the maker of the notes. The amount thus lost was one of the items sued for, and a part, but not all of it, was allowed by the jury, as is manifest from the verdict. These notes were given by Hughes to the husband of appellee, for a half interest in a saw-mill, which mill was operated by Hughes during the lifetime of the appellee's husband and after his death.

It is claimed by appellee that while this settlement was made at her house, and in a certain sense in her presence, yet she really knew nothing about it; that it was made without her concurrence, and that the note which was taken for the balance agreed on in the settlement was left by the parties on her table and found there by her after they went away. She insists that there was no reason for such a reduction; that it was the result of gross incompetence or of corruption on the part of appellants; and while she kept the new note and has received some payments on it, yet, in the transaction, her rights were seriously affected, and that appellants should bear the loss so occasioned.

To her positive statement that the settlement was wholly erroneous, the appellants answer merely that she agreed and consented to it and therefore ought to be bound by it. Thus the issue seems to have been whether she did so consent and agree.

It is significant that the appellants did not explain the settlement; that they did not seek to show it was fairly made and that it was based upon items properly chargeable to the appellee. Their failure to do this and the attempt to support the settlement on the sole ground that appellee consented to it induces the suggestion that it would not bear the test of examination. The relative position of the parties, and the circumstances attending the matter, were such as to call for the utmost fairness and good faith on the part of appellants and to relieve the appellee from a stringent application of the rule by which acquiescence and want of objection may be considered tantamount to consent and agreement. We are content to rest upon the verdict of the jury as to this point as well as to other contested questions of fact which need not be specifically stated.

The legal point mainly urged by counsel for appellants is, that because the property was placed in the hands of the appellee by her husband, for the purpose of avoiding the payment of his debts, the transaction is void and the property belongs to the estate of deceased, and that an action for its misappropriation will lie at the instance of the adminis-

Ellis v. Petty.

trator only. The transfer might be impeached by creditors, if it was a fraud upon them, but it could not be by the administrator, and subject to the rights of creditors the title of appellee was good. Appellants, having received the property from her as her bailees or trustees, can not be heard to say that it was not hers. Had the property been taken out of their hands at the instance of creditors a very different aspect would be presented. The court properly refused an instruction that the suit could be maintained only by the administrator. *White v. Russell*, 79 Ill. 155; *Beebe v. Sautler*, 37 Ill. 518.

It is urged the court erred in giving the following instruction at the instance of appellee:

"The court instructs you, that if you believe from the preponderance of the evidence that defendants, Henry T. Ellis and Thomas H. Ford, agreed with the plaintiff that they, the defendants, would jointly settle up and pay off the debts of the estate of Morris Ellis out of the proceeds that they might receive from the farm in question, and out of moneys, notes and personal property of plaintiff, and if you further believe from the preponderance of the evidence that defendant received money, notes and personal property of and belonging to the plaintiff, for that purpose, and if you further believe from a preponderance of the evidence that defendants converted any of said money, notes and personal property to their own use, and did not use and apply the same in settling up the estate of Morris Ellis, or in paying off the debts of said estate, that then the plaintiff would be entitled to recover the value of said notes or property thus converted, if the evidence shows that the same was converted."

The objection is that the instruction authorizes the jury to allow for the proceeds of the land, as well as for the money, notes and personal property. We think it does not bear such construction. The appellee was suing only for the personal assets placed in her hands by her husband. The land referred to in the evidence had been deeded by the husband to one Ruby and appellant Ford, and after the husband's death Ruby conveyed to appellant Ellis. Ford also

conveyed to Ellis, and for the consideration of \$400, appellee released her dower.

Afterward Ellis sold the land and realized some \$2,100 above the mortgage placed thereon by the husband, and it appeared that it was understood by all parties that the proceeds of this land should be applied upon the indebtedness of the deceased husband.

These facts came out in the course of the proof, and while they showed a liability on the part of appellant Ellis, and perhaps also on the part of Ford, to account to the estate, yet it can not be contended that the appellee could maintain an action in that behalf.

If it could reasonably be said that the instruction probably did mislead the jury as to this item, the objection would be a very serious one; but after a careful reading of it in the light of the evidence and of the other instructions we feel constrained to overrule the objections.

The condition of recovery as made by the instruction was the misapplication of the "money, notes and personal property," and the recovery was to be for "the value of said notes or property thus converted."

This we think so explicitly stated and limited the basis upon which recovery must rest, as that the jury were not misled.

No other points are presented by the brief and the judgment of the Circuit Court will be affirmed.

William H. Mason v. The People, etc.

1. **REVENUE—*Listing Property.***—A person handling personal property merely for the account of another is not required to list it for taxation.

Memorandum.—Prosecution under the revenue law for failing to list property. Appeal from the Circuit Court of Scott County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1863. Reversed and remanded. Opinion filed October 28, 1893.

Grimes v. Hilliary.

The opinion states the case.

JAMES CALLANS, attorney for appellant.

T. J. PRIEST, state's attorney, for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant was convicted of failing to make a schedule of personal property in his possession and under his control required to be listed for taxation.

We have examined the evidence and are satisfied the conviction is unwarranted.

The property which he is charged with not listing was not his. It belonged to his father and was handled by him merely for his father's account, nor was it in his possession or under his control in the sense intended by the statute. Moreover, it was listed by the owner, according to his testimony.

In any view we can take of it we think the defendant was not guilty under the proof. The judgment will be reversed and the cause remanded.

James Grimes v. Geo. F. Hilliary, Administrator, etc.

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1. EVIDENCE—*Measure of Proof*.—Where the plaintiff in his declaration charges the defendant with an unlawful act it does not follow that he is required to make out his case by more than a preponderance of the evidence. Where the pleadings allege a criminal act or where the plaintiff's case necessarily involves a charge of crime, the proof must be full and satisfactory, but it need not be such as to convince the jury beyond a reasonable doubt.

2. PAYMENT—*Burden of Proof*.—An averment in a declaration on a note averring that the note is not paid, need not be proved; it devolves upon the defendant to show payment by affirmative and preponderating proof.

Memorandum.—Assumpsit on a promissory note. Appeal from the Circuit Court of Vermilion County; the Hon. EDWARD P. VAIL, Judge,

presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 4, 1893.

The opinion states the case.

LAWRENCE & LAWRENCE, attorneys for appellant.

E. R. E. KIMBOUGH and CALHOUN, STEELEY & JONES, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee, as administrator of Jacob Grimes, Sr., deceased, recovered a judgment against the appellant for \$1,094.65 on account of a note for \$900, given by the latter to the intestate. In the declaration as originally filed the plaintiff counted upon this note and another for \$1,000, and alleged the loss of the notes.

After the evidence had been heard the declaration was amended so as to allege that the defendant had unlawfully destroyed the two notes whereby the same were totally lost to the plaintiff's intestate, and that the same had not been paid.

There was evidence enough to satisfy the jury that the notes were destroyed by the defendant, and we have no doubt on this point.

The only questions for present consideration relate to the ruling of the court in admitting evidence and the giving of instructions.

It is urged that the court erred in allowing the plaintiff to introduce the bill of discovery and the answer of the defendant thereto in the case reported in 38 Ill. App. 246. In this there was no error.

It is urged also that the court should have instructed the jury that it was incumbent upon the plaintiff to make out his allegation that defendant destroyed the notes by proof beyond a reasonable doubt. The pleadings did not charge the defendant with a crime or misdemeanor, but at most with a mere trespass, and this only for the purpose of excusing the plaintiff for not producing the notes in evidence.

Because the unlawful act of the defendant might have been willful and malicious, and with such intent as to be indictable under the criminal code, it does not follow that the plaintiff, alleging the unlawful act merely, was required to make out his case by more than a preponderance of the evidence. Where the pleadings allege a criminal act, or where the plaintiff's case necessarily involves a charge of crime, and it must be so alleged, or where, if the pleadings are oral, a charge of crime is necessarily involved, the proof must be full and satisfactory, or, as is sometimes said, there should be a clear preponderance of proof (*Riggs v. Powell*, 142 Ill. 453); but we do not understand that even in such case the court is required to advise the jury that the proof must be such as to convince their minds beyond a reasonable doubt. *Sprague v. Dodge*, 42 Ill. 142.

We are inclined to agree with the ruling of the Circuit Court on this point.

Error is assigned upon the giving of the following instruction at the instance of appellee :

"If the jury believe, from the preponderance of the evidence, that the defendant made and executed a note for \$900 to Jacob Grimes, Sr., which note was dated on or about August 14, 1873, and by the terms thereof was to become due and payable in ten years after the date thereof, and that said note bore no interest, and if the jury further believe from the preponderance of the evidence that said Jacob Grimes, Sr., died in 1885, more than a year before the said note became due and payable, then there would be no presumption of law that said note was paid when the said Jacob Grimes, Sr., died, and the burden is on the defendant to prove that said note was paid by him, either to the said Jacob Grimes, Sr., in his lifetime, or to the plaintiff since the death of said Grimes, Sr., and if the defendant has not so proven the payment of said \$900 note by a preponderance of the evidence, then, as to such note the jury should find for the plaintiff, as to the amount due thereon, with six per cent interest from the maturity of said note, less whatever payments, if any, the evidence may show were paid thereon."

It was averred in the declaration that the note was unpaid, and so it is always averred in an ordinary action upon a note which the plaintiff is able to produce.

Such a negative averment need not be proved, and it always devolves upon the defendant to show payment by affirmative and preponderating proof.

Here the making of the notes was established, and there were such facts as showed that the defendant had obtained possession of and destroyed a note not yet due and not bearing interest. Indeed there can be no question that he did so.

The law would cast upon him the burden of showing why he did it, and the justification interposed was based upon an alleged payment, and as the case stood, this was the only issue for the jury to try.

The *onus* as to this was properly placed upon the defendant.

The jury found for the defendant as to the note for \$1,000 due before it was destroyed. With this finding the plaintiff appeared to be content, though there was considerable proof to show that if the money was paid to the intestate he did not reinvest it, nor did he have it on hand when he died, a very short time after the alleged payment.

The judgment will be affirmed.

William Phelan and Patrick Phelan v. Bert M. Kuhn.

1. **FRAUD AND DECEIT**.—*When the Action Lies*.—An action for fraud and deceit will lie for a false and fraudulent misrepresentation of an existing fact—for example, the contents of the contract of lease by which the lessees were induced to sign and so to assume very onerous obligations on their part.

Memorandum.—Action for deceit. In the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Judgment on demurrer to declaration; appeal by plaintiff. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed December 4, 1893.

The opinion states the case.

Phelan v. Kuhn.

APPELLANTS' BRIEF, R. L. FLEMING, ATTORNEY; FIFER & PHILLIPS, OF COUNSEL.

An action on the case for the false representations and deceit used to induce plaintiffs to enter into a contract whereby they were damnified can be maintained independently and regardless of the remedy which the law affords on the contract. *Antle v. Sexton*, 32 Ill. App. 339; 2 *Addison on Torts*, 1004; 1 *Hilliard on Torts*, Secs. 4, 5 and 12; *Chitty on Pleadings*, 137, Note 4; *Ward v. Winian*, 17 *Wend.* 193; *Eames v. Morgan*, 37 Ill. 260.

The terms of a written contract may be varied by parol evidence, when the contract was entered into through fraud.

It is urged that the oral contract is merged in the written one, and we could not be suffered to contradict the terms of the writing by parol evidence, and this is true except in case of fraud. But fraud is the essence, the soul, the body, and the very life of the present action, therefore the exception and not the rule applies. *Schwass v. Hershey*, 125 Ill. 659; *Black v. Wabash, St. L. & P. Ry. Co.*, 111 Ill. 351; *Gardt v. Brown*, 113 Ill. 479; *Hicks v. Stevens*, 121 Ill. 191.

It is not necessary to aver that plaintiff is unable to read when it is alleged that he was fraudulently prevented from reading. *Strong v. Linington*, 8 *Brad.* 445.

Diligence is a question of fact for the jury to consider, and need not be alleged in the declaration. "It is not a question of law to be determined by the court." *City of Chicago v. Keefe, Admr.*, 114 Ill. 222.

"Whether the plaintiff is guilty of such negligence as will preclude him from setting up his defense is a question for the jury." *Munson v. Nichols*, 62 Ill. 111.

If one party is trusted to reduce the contract to writing, he is bound to do it truly, and any variation from it materially affecting the other party, if known to him, is a clear fraud. *Botsford v. McLean*, 45 *Barb.* 487; *Smentek v. Cornhauser*, 17 *Brad.* 269; *Bigelow on Torts*, 29-30; *Bigelow on Frauds*, 73.

The law only requires that a person signing an instru-

ment should read it or cause it to be read by some one in whom he places confidence. *Taylor v. Atchison*, 54 Ill. 196.

Only reasonable diligence is required. *Coyne v. Dooley*, 34 Ill. App. 31.

No man can complain that another has relied too implicitly upon the truth of what he himself stated. *Kerr on Fraud*, 80; *Lloyd v. Higbee*, 25 Ill. 603; *Addison on Torts*, 1004; *Pasley v. Freeman*, 3 T. R. 55; *Eames v. Morgan*, 37 Ill. 260; *Weatherford v. Fishback*, 3 Scam. 171; *School Directors v. Boomhour*, 83 Ill. 17; *Easter v. Minard*, 26 Ill. 494; *Allen v. Hart*, 72 Ill. 104; *Kohl v. Lindley*, 39 Ill. 195; *Champion v. Ulmer*, 70 Ill. 322; *Hubbard v. Rankin*, 71 Ill. 129.

LILLARD & WILLIAMS and JOHN J. MORRISSEY, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

The Circuit Court sustained a demurrer to the declaration herein and each count thereof, and thereupon rendered judgment for defendant for costs, from which plaintiffs prosecute this appeal.

It was an action on the case for fraudulent misrepresentation and deceit, and the declaration, in five counts, alleged in substance that on January 25, 1892, the parties verbally agreed on the terms of a lease by defendant to plaintiffs, of his farm of 400 acres for five years, from the first day of March then next, at an annual cash rent of \$1,600, to be reduced to writing, by which it was, among other things, to be provided that he should furnish all the tile required to drain the land in time to enable them to lay and place it during that spring before plowing; that plaintiffs, being illiterate and unable to write or to read writing, then proposed to defendant to employ at their own expense a disinterested and competent attorney to reduce them to writing, but he prevented, by assuring them that he would do it properly himself, and they consented that he should;

that he then drew up the lease, and then and there represented to them that he had put in it the provision relating to the tile, as it had been agreed upon, and pretended to read to them from the lease he had prepared, and as being included, words which fully covered and expressed it—all with fraudulent intent, fully charged; that they relied implicitly on his promise that he would, and his representations that he did put that provision in it, and were thereby induced to execute it, which they would not have done if they had known, as the fact was, that it really contained no such provision.

It further avers that the demised lands are low and wet, and can not be cultivated without draining; that no crops were or could be raised thereon in 1892, for want of tiling; and that the lease, without defendant's obligation to furnish the tile required, is worth far less than it would be with it, to wit, the sum of \$4,000. One of the counts contains the additional averment that on March 1, 1892, defendant sold and transferred the farm, with said lease, to George J. McGinnis, who refuses to tile it.

For appellee it is contended that upon the facts as averred, appellants' only remedy is upon the agreement really made but fraudulently omitted from the lease; in other words, that plaintiffs' only cause of action, as stated, is the breach by defendant of his executory agreement to furnish the necessary tile.

In such case the law clearly is that an action for fraudulent misrepresentation and deceit will not lie. To maintain that action it must be averred and proved that the fraudulent misrepresentation related to and was of a fact then existing. An intention as to the future is not such a fact. Although appellee when he made the agreement, may have intended, however fraudulently, not to perform but to break it, the only remedy for his actual breach of it, would be upon the agreement; and if such is the case made by this declaration, the demurrer thereto was properly sustained and the judgment should be affirmed. The People ex rel. v. Healey, 128 Ill. 14, and authorities there cited.

But we do not so read this declaration, nor can we so con-

strue it. As we understand it the cause of action stated is not the failure of defendant to furnish the tile, nor the fraudulent omission from the lease of his agreement to furnish it — each of which is so often claimed in the argument — but simply and solely the false and fraudulent misrepresentation of an existing fact, namely, the contents of the contract of lease they were asked and thereby induced to sign and so to assume very onerous obligations on their part.

In the transactions stated there was, first, an executory agreement of defendant, that he would put in the lease to be drawn up by him, a provision binding him to furnish the tile, and second, an executory agreement thereby made that he would furnish it. The first would have been executed by the inclusion in the lease of the second. He represented that it was so included. That was a matter, not of intention or of agreement to be thereafter performed, but of fact then existing. The representation was alleged to have been false and fraudulent, and injurious to the plaintiffs, who were deceived thereby. These are all the elements of a case for an action like this. The damage alleged and to be recovered, if any, is not the loss of crops or any other directly resulting from defendant's failure to furnish tile, but the lessening of the value of plaintiff's lease, the written instrument by which their interest in the premises is shown. Such instruments are of themselves property, and have a value depending on their provisions. They may be indispensable to the enjoyment of a right and therefore as valuable as the right itself. A lease for five years, of 400 acres of low, wet land, containing an enforceable agreement of the lessor to furnish all tile necessary to drain it, is certainly a very different thing, as respects value, from such a lease without such an agreement. That difference would seem to be at least what it would cost to procure the tile. But we are not now concerned with the rule as to the measure of damages, nor intending to indicate it. For present purposes it is sufficient, if plaintiffs were shown by the declaration to be entitled to recover.

We are of opinion that it states a case of fraudulent mis-

McLean County Coal Co. v. Lamprecht.

representation of a matter of existing fact, by which plaintiffs, without their fault, were deceived and damaged, and they are not limited for remedy to an action on the lease, when it shall be reformed, so as to show the alleged agreement to furnish tile. *Antle v. Sexton*, 32 App. 439, and authorities cited; same case, 137 Ill. 410. The judgment of the Circuit Court is therefore reversed and the cause remanded.

McLean County Coal Co. v. August Lamprecht.

1. CARE AND DILIGENCE—*Miners at Work, etc.*—A careful and prudent miner will not willingly and knowingly incur avoidable danger. An injury resulting from such an unwarranted and reckless course could not be made the ground of recovery.

2. NEW TRIALS—*On Findings of Juries.*—Where the verdict of a jury is palpably against the evidence, and so manifestly wrong, the duty of the court to interfere is imperative, and it will be set aside.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1893. Reversed and remanded. Opinion filed December 22, 1893.

The opinion states the case.

APPELLANT'S BRIEF, STEVENSON & EWING AND JOHN F. WIGHT,
ATTORNEYS.

We ask a reversal of this judgment because there is not sufficient evidence in the record to maintain it; it is so completely against the great preponderance of the evidence that it comes clearly within the rule that the court will grant a new trial when the verdict is the result of prejudice and passion.

APPELLEE'S BRIEF, WILLIAM B. CARLOCK AND KERRICK, LUCAS
& SPENCER, ATTORNEYS.

The rule in this State is that the finding of the jury will not be disturbed as against the evidence, where there is

nothing more than a mere doubt as to the correctness of the verdict. *Erie & Pac. Dis. v. Stanly*, 22 Ill. App. 459; *I. C. R. R. v. Cowles*, 32 Ill. 116; *Marble v. Bonhotel*, 35 Ill. 240; *O'Rielly v. Fitzgerald*, 40 Ill. 310; *DeForrest v. Oder*, 42 Ill. 500; *C. & N. W. Ry. v. Dement*, 44 Ill. 74; *Baker v. Robinson*, 49 Ill. 299; *Stevens v. Brown*, 58 Ill. 289; *Reynolds v. Palmer*, 70 Ill. 288.

Nor will the verdict be set aside if the evidence of the prevailing party is of itself sufficient, if believed, to support the verdict. *Bush v. Kindred*, 20 Ill. 93; *I. B. & W. v. Buckles*, 21 Ill. App. 181; *Fletcher v. Patton*, 21 Ill. App. 228; *Haldeman v. Sennett*, 21 Ill. App. 230; *Springfield v. Sieglar*, 21 Ill. App. 334; *I. B. & W. v. Hinshaw*, 21 Ill. App. 335; *Forlauf v. Bowlin*, 29 Ill. App. 471; *Calvert v. Carpenter*, 96 Ill. 63; *Addems v. Suver*, 89 Ill. 482.

The evidence in the case at bar was such that the jury might have found either way; and that being the case, the verdict will not be set aside. *Smith v. Williams*, 22 Ill. 357; *Peoria Grape Sugar Co. v. Frazer*, 26 Ill. App. 60; *Lewis v. Lewis*, 92 Ill. 237; *Buchanan v. McLennan*, 105 Ill. 56.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The action below was a case by the appellee against the appellant company to recover damages for an injury received in appellant's mine, occasioned, as it was alleged, by the negligence and improper conduct of the servants of the appellant.

A trial before a jury resulted in a verdict and judgment against the appellant in the sum of \$5,000, from which this appeal is prosecuted.

No stronger statement of the grounds upon which appellee's right of recovery is based can be given, than that made by his counsel in the brief filed in his behalf as follows (except as we have caused it to be italicized) viz :

"The vein of coal in this mine is from three and one-half to four feet thick. The first thing the miner does in the prosecution of his work, is to take the earth or other substance immediately below the coal, out, so as to leave the

coal projecting into the room and hanging over the bed or place where the excavation is made. *A careful miner, when he has dug to any considerable extent, takes a prop, one end of which is placed in the bottom of the room and securely fastened, and the other end is placed against the face of the coal.* That prop, by the miners, is called a 'sprag,' and usually stands at an angle of about forty-five degrees, and prevents the coal from falling on the miner, while he is still digging underneath the coal, in case there should be any tendency toward falling or any weakness in the vein of coal at the point he is working. When the miner has dug underneath the coal till he comes to a 'break,' he stops digging and knocks the coal down. That is usually done by placing a wedge in about the center and splitting or breaking off the lower half, which drops down, leaving the top half still supported by the 'sprag.' *When the lower half of the coal is broken up and taken away then the 'sprag' is knocked out and the upper half drops down, and it in a like manner is broken up and carried away."*

"Appellant claims to have had a rule by which miners were forbidden to use railroad ties for 'sprags,' but the evidence clearly shows that it very often happened that the company failed to supply 'sprags,' as it was its duty to supply them, and in all such cases, the miners, without any question from the company, used railroad ties, *i. e.*, ties the company had supplied for laying a track for its coal cars in the bottom of the mine. In addition to the 'sprags' used by the miners, they also used props, which they placed perpendicularly to support the roof of the mine. A few days before the day of the accident, appellee had been unable to procure props, such as the company supplied, and had, therefore, taken some ties to be used by him as props and 'sprags.' He took four of those ties to his room, two of which he placed in an upright position and the third on top of the two as a cap to support the roof of the mine. The fourth he placed as a 'sprag.'"

"On the 19th of December, 1891, appellee went to work about 7 A. M. At that time James Doran was track layer for the company, *i. e.*, it was his business to superintend the

construction and repair the tracks of the company, and for that purpose, of course, had the use and control of the ties. About 10 oclock A. M. Doran went into the room where appellee was at work, and ordered appellee to take the ties out of his room, *i. e.*, the three ties that appellee had placed as props and the one that he had placed as a 'sprag.' Appellee, well knowing the danger of taking them away, refused to comply with the order and told Doran that he could not do it, and thereupon Doran became very angry and said that he would do it if appellee would not, and he said 'G-d d—n Dutch, I will take them away anyhow.' Doran thereupon took his sledge and knocked out all the ties, *including the one used as a 'sprag,'* and loaded them in his cart and took them away, and instead of the four ties, put up a single prop, such as the company supplied for that purpose, *but put up no 'sprag,' thereby leaving the coal wholly unsupported.*" * * *

"The coal that appellee had mined, and that was supported by the 'sprag' in question, was just a little to the left of that track and to the left of the center of the roadway. *After Doran had taken out the props and 'sprag,' appellee removed some coal that had been broken down, so as to get it out of the roadway, and then started to go toward the east for the purpose of getting his tools to make the coal secure. In order to do so it was necessary for him to pass close to the face of the coal, and while doing so, the coal fell down, catching appellee's left leg and breaking and crushing it, as above stated.*"

The alleged wrongful and negligent conduct of appellant's track layer, Doran, is that he took away the tie used as a "sprag" and put up no "sprag," thereby leaving the coal wholly unsupported, so that it fell upon the appellee as he was passing by for the purpose of getting his tools to make it secure.

The appellant company denied that Doran took away any tie or prop that was in use as a "sprag" to support the coal and further denied that any tie was so in use, and also denied that the appellee was injured while passing near the coal in

order to get his tools, but asserted that the appellee, when hurt, was negligently and recklessly "splitting down" the lower half of the vein of coal without having a prop or "sprag" in place to support the upper half.

The only proof that Doran took away a "sprag," or any tie used as a sprag, was the unsupported testimony of the appellee. In this he was directly contradicted by Doran and by John Dugan, the latter of whom assisted Doran in the removal of all ties that were taken. Both of these witnesses deny that any tie used as a "sprag" was taken. Doran testified that no tie was so in use and Dugan swore that he was there and assisted in removing all the ties that were taken and that he did not see any tie in use as a sprag. So unless there was some reason for discrediting these witnesses the preponderance of the evidence upon this point was against the appellee.

The assertion of the appellee that the coal fell upon him as he was passing by the face of the vein on his way to get his tools, had no support except his own testimony to that effect.

Chas. Roline, who, at the time the appellee was injured, was mining within a few feet of him, testified that he saw the appellee at work driving a wedge into the vein of coal with a sledge hammer, immediately before the coal fell; that he heard the coal fall, went at once to appellee, found him under the coal, his sledge hammer on the ground immediately in front of and but about one foot away from him, his pick by his side and partly under the fallen coal. Doran, Quanstran, Buckle and Mumber, witnesses for the appellant, testified that they came at once to the assistance of the appellee and aided Roline in removing him from under the coal and that they saw the pick there partly hidden by the coal. It would seem utterly unreasonable to insist that all these disinterested witnesses should be discredited and the testimony of the appellee, interested as he is in the result of the suit, accepted as sufficient to outweigh them all. Yet unless this is done, it must be clear that the coal did not fall upon the appellee as he was passing by on the way to get his tools,

but that he had his tools and caused the coal to fall by driving a wedge into the vein and breaking it down when it was not supported by a sprag. Other facts uncontestably proven ought, it seems to us, have put it beyond controversy that the appellee was wedging and breaking down the coal when it fell upon him.

He testified as follows:

Q. Then what did you do when they took away the ties?

A. I went and got a car and pushed it in on the face of the coal; then I put a chunk of coal in, and then went to get my tools.

Q. How long was it after Mr. Doran went away before you were hurt?

A. Right away; I took the car and came in right away and went in.

Q. Was it an hour or ten minutes?

A. No, sir; I took the coal car and went in and put one chunk of coal on the car, and then wanted to fix them solid where he took the ties away.

Q. How long was it after Doran went away before you got hurt—after Doran and Dugan went away with the ties?

A. Maybe a minute, or maybe a little bit longer; I backed up the car and threw a chunk into the car and went right for my tools; the tools were about ten feet from the car.

The witnesses who hastened to appellee's assistance after extricating him from the coal intended to put him in the car referred to in his answer, in order to convey him out of the mine, but found it partially loaded with coal—perhaps one-third full—so that they could not use it for the purpose, but had to move it away and bring in an empty car in which to place him. This they did and thus brought him to the shaft of the mine. The quantity of coal in the car could only be accounted for upon the theory that after Doran went away appellee brought in the car and proceeded to mine and break down the coal and load it in the car and so continued until the coal fell upon and injured him and is absolutely irreconcilable with the appellee's theory and testimony that

McLean County Coal Co. v. Lamprecht.

he brought in the car, threw one chunk of coal into it and then went to get his tools and was hurt while making his way to them. Another fact, established by the testimony of appellant's witnesses and also by Berry, a witness for the appellee, and denied only by the appellee, not only tended to discredit the appellee as a truthful and reliable witness, but also added its weight to the appellant's contention that appellee, when hurt, was and for some time before had been engaged in mining, wedging and breaking down the coal, and had, after Doran left him, mined and loaded into the car the coal found to be in it. The fact referred to is that the appellee was hurt one hour and a quarter after Doran and Dugan went away with the ties. Appellant's witnesses and Berry, a witness for the appellee, so testified, while appellant testified, as is seen by his answer to the last question hereinbefore, that "it was only a minute or may be a little bit longer." The time that elapsed after Duran took the ties and the quantity of coal in the car, confirmed appellant's contention, already well established, that appellee was mining and breaking down coal when hurt.

All concede, and so it is stated by appellee's counsel, that a careful and prudent miner would not undertake to split and break down coal with a wedge without first securing it with a "sprag." To do so would be to willingly and knowingly incur avoidable danger. An injury resulting from such an unwarranted and reckless course could not be made the ground of recovery, even had the appellee been improperly deprived of a sprag by appellant's servant, Doran. But as we have seen, the preponderance of the evidence is that Doran did not remove the "sprag."

It was the duty of the appellee to put the sprag in position. His counsel say in the statement quoted: "A careful miner, when he has dug to any extent, takes a prop, one end of which is placed at the bottom of the room and securely fastened, and the other end placed against the face of the coal. This prop is called a sprag, and prevents the coal from falling on the miner."

Because such was his duty he sought to establish that he was

not mining or breaking down the coal when hurt, and endeavored to show that Doran took away the sprag and that the coal fell upon him while he was passing near it, on his way to get his tools "to make the coal secure," and this made necessary the claim that he was injured, "may be a minute or a little bit longer," after Doran left him. In all these respects the evidence preponderated against him.

We recognize in its fullest extent the rule that great weight is to be accorded to the findings of a jury, but here the verdict is so palpably against the evidence, and so manifestly wrong, that our duty to interfere is imperative.

A new trial should have been granted the appellant company. Because it was refused, the judgment must be and is reversed, and the cause remanded.

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Wabash Railroad Company v. Lloyd W. Brown et al.

1. **WAIVER—Of Conditions in Freighting Contract.**—Where a clause in a contract of shipment provided that all claims for injuries to stock should be made in writing and verified by an affidavit and delivered to the general freight agent of the company within five days after the stock was removed from the car, *it was held* that the company, by receiving a claim not verified according to the contract without objection and acting upon the same, waived the condition.

2. **COMMON CARRIERS—Right to Contract Against Liability.**—A common carrier can not shield itself by contract against any portion of the damages inflicted by gross negligence upon property in its care and being transported by it.

3. **RAILROAD COMPANIES—Contracts of Exemption from Liability.**—It is unlawful for the railroad company to contract for exemption from liability resulting from the gross negligence of its servants.

Memorandum.—Action for damages for injury to stock. Appeal from the County Court of Morgan County; the Hon. O. P. THOMPSON, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The statement of facts is contained in the opinion of the court.

Wabash R. R. Co. v. Brown.

GEO. B. BURNETT, attorney for appellant.

E. L. McDONALD and J. M. BROWN, attorneys for appellees.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The appellee shipped a number of high bred valuable cattle on appellant's road, under a special contract signed by the parties, the material provisions of which are as follows:

"Sixth. In consideration of this agreement, the party of the second part hereby releases the party of the first part, and connecting lines, from all claims for damages that may be occasioned by the burning of hay, straw or other material placed in said car or cars, for the purpose of feeding or bedding said stock."

* * * * *

"Tenth. In consideration of the rate aforesaid, it is further agreed that no claim for damages which may accrue to the party of the second part under this contract, shall be allowed or paid by the party of the first part, or sued for in any court by the party of the second part, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the party of the second part, or his or their agent, and delivered to the general freight agent of the party of the first part, at his office in the city of St. Louis, within five (5) days from the time said stock is removed from said cars."

"Eleventh. It is agreed that neither the party of the first part, nor any connecting line, shall be liable for more than the sum of \$100 on account of loss or injury of any one horse or other animal received or carried by the party of the first part under this contract."

At each end of the sixth clause is a bracket in red ink, and on the margin of the contract is written in red ink the following: "My special attention has been directed to clause No. 11, limiting the liability in case of accident, and to which condition I knowingly subscribe."

Hay used for feeding or bedding the cattle in the car took fire, and one of the animals, a valuable cow, called the Fourth Duchess of Hilsdale, was badly burned about her legs, belly and lower part of her body. Her bag sloughed away and was totally destroyed. The action was brought to recover damages thus occasioned.

The jury found for the appellee and assessed the damages at \$650. It is not urged that the amount is excessive. It may be conceded as urged by the appellant's counsel, that the effect of the special contract is to exempt the appellant's company from liability, except for damages resulting from the gross negligence or willful misconduct of its servants, and we may add that it has no effect to relieve it from damages occasioned by the gross negligence of its servants. *Arnold v. R. R. Co.*, 83 Ill. 273; *C. & N. W. R. R. Co. v. Chapman*, 133 Ill. 96.

Appellant insists that there is neither allegation nor proof of such gross negligence or willful misconduct.

The proof is that the car containing the cattle in which was also hay for feeding and bedding them was placed by the appellant's servants the second or third car from the engine in a train of twenty-six cars, and that it was the only car containing stock in the train. The evidence, though circumstantial, was sufficient to warrant the jury in concluding that fire was communicated from the engine to the hay in the car. It was not attempted to prove that the engine was provided with appliances of any kind or character to prevent the escape of fire, or that it was in the charge of a competent or skillful engineer.

The fact that fire was communicated from the engine to the hay in the stock car, was evidence of negligence on the part of the appellant company on the authority of *Bass v. C., B. & Q. R. R. Co.*, 28 Ill. 9, and *I. C. R. R. Co. v. Mills*, 42 Ill. 407, if such fact was not full *prima facie* evidence to charge the appellant with negligence as a matter of law, by the operation and effect of Sec. 104, Chap. 114 of the Revised Statutes (S. & C. Statutes). The appellee contended that the appellant company was guilty of gross negligence, in

Wabash R. R. Co. v. Brown.

fact, in putting a stock car which it knew contained inflammable feed and bedding in such close proximity to the engine, when it might have been removed many car lengths therefrom.

It is manifest from the sixth clause of the contract that the appellant company had notice that hay or straw or other inflammable material was to be placed in the car and was fully aware of the danger that fire might be communicated to such combustible material. It recognized and sought to contract against such danger, yet voluntarily placed the car in close proximity to the engine, which might well be deemed negligence. Then; that the appellant company was negligent in point of law, and as matter of fact, was clearly established. The degree of negligence, whether inadvertent or gross, was a question of fact for the jury under proper instructions. The court in instructions both in behalf of appellee and of the appellant, carefully and properly defined gross negligence, and expressly charged the jury that their verdict should be for the appellant company, unless the preponderance of the evidence showed that its servants had been guilty of gross negligence in the transportation or management of the stock or train. The jury found that the negligence of the appellant company was gross in its character and degree. It can not be said that the finding was manifestly wrong.

It is next urged that the appellees were not entitled to recover, because no claim for the loss or damage sued for was made in writing and verified by an affidavit and delivered to the general freight agent of the appellant company within five days after the stock was removed from the car as was required should be done by the tenth clause of the contract of shipment. It was proven that one of the appellees, within less than the required five days, indited a letter to the claim agent of the appellant company in which he stated the fact of the injury to the cow and also that the extent of the injury or the amount of damages likely to result therefrom could not then be ascertained, etc. This letter was placed in an envelope which was addressed to the claim

agent and delivered within less than five days after the injury to Mr. Todd, who was the station agent of the appellant company at New Berlin, a station on the line of its road. In October following, the appellees again wrote to the appellant's claim agent and in this last letter, after reciting the facts of the injury to the cow, said: "We immediately notified you of the injury, advising you that as soon as the extent of damage could be ascertained, we would claim payment for the same."

This letter elicited an answer from appellant's freight claim agent to the effect that the claim had been referred to the legal department for an opinion as to liability upon the claim and that the appellees would be informed what action would be taken when the advice of the law officer of the road had been received, and that if necessary the writer would visit the appellee at New Berlin for the purpose of examining the cow, and if possible agreeing upon the amount of damage if the company was liable to pay damages.

The letter first written by Mr. Brown, was within five days after the removal of the stock from the car. It was not verified by an affidavit, and for that reason and perhaps others was not in full compliance with the agreement regarding notice.

The jury were warranted, however, in believing that the company received it without making objection or pointing out its defects, and afterward treated the claim as properly pending for adjustment upon its merits.

We think it was rightly held that the appellant company had waived further or other notice of the alleged loss. *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388.

It is next insisted that the provisions of the eleventh clause of the contract of shipment limits the liability of the appellant to \$100 on account of loss or injury to any one animal, and that the recovery for a larger sum can not for that reason be upheld.

It is not contended that the shippers made any representation or statement as to the value of the animals and obtained a reduced rate on account of such stated value. The clause

in question of the shipping contract does not purport to fix \$100, or any other sum as the agreed value of the animal. Can it be construed as an admission on the part of the shipper that the cow was worth no more than that? The clause is neither more nor less than an agreement that in no event shall the carrier be held liable for injury and damage to any one animal above the sum named. It is a contract for partial exemption from liability. If the liability arose, as we have seen it did from the gross negligence of the appellant company, the stipulation was ineffectual to relieve the company from liability, either partial or total.

A common carrier can not, in our opinion, shield itself by contract against any portion of the damages inflicted by gross negligence upon property in its care and being transported by it.

We are aware of the conflict of decisions on this point, but if there was ever doubt as to the rule in Illinois, it is now removed by the doctrine announced by our Supreme Court, in the case of *Chicago & Northwestern Railway v. Chapman*, 133 Ill. 96. Expressions made use of in the course of the opinion in the case cited are thought by counsel for the appellant company to justify the conclusion that where a carrier has two classifications under which live stock may be shipped, the one limiting the recovery to a stated sum on any one animal in case of loss or injury, and that in the other class there was no limitation, but a higher rate of freight was charged, the shipper, if he have notice of such classification, will be bound by the limitation as to the amount to be paid in case of loss, if he ships under that classification and at the reduced rate, and these expressions are relied upon as furnishing a governing rule for this case at bar. While it is said by the court that such classifications could in no way affect the shipper unless notice thereof had been brought home to him, it must not be understood as implied that he could be affected and precluded by such notice, for the court, proceeding in the course of the same opinion, says:

“But it (the classification) can not avail in any event as

against a right of recovery here. Plaintiff was guilty of no misconduct which would estop him from asserting his right to recover the value of his property, and it was unlawful for the railway company to contract for exemption from liability resulting from the gross negligence of its servants."

The objections urged against the instructions are disposed of by what has been said in the course of the opinion.

Finding no error in the record, the judgment must be and is affirmed.

**Harriet Elder et al. v. F. K. Whittemore, Administrator
of the Estate of Hiram Walker, Deceased.**

1. ADMINISTRATION OF ESTATES—*Exception to Administrator's Report.*—Persons excepting to an administrator's report are required to specify such items or portions thereof as they intend to question by particular exceptions thereto.

2. ADMINISTRATION OF ESTATES—*Character of Exceptions to Administrator's Report.*—Exceptions to an administrator's report may be as well for what is claimed to be improperly omitted from the report as upon what is claimed to be untruly stated therein.

3. ADMINISTRATION OF ESTATES—*Overruling Exceptions to an Administrator's Report.*—If exceptions to an administrator's report are overruled, and the report approved, the order of approval, though general in terms, is understood to be specific as to each item stated, and the omission of each, the omission of which is made a ground of a specific exception. Each of these items is separate from all others, and the order of approval as applied to one, is wholly independent of the same as applied to others.

4. APPEALS—*From an Order Approving Administrator's Report.*—Where exceptions are filed to an administrator's report, the only issues made are upon such specific exceptions. Hence, an appeal from the order as applied to one item, whether the exception be to the item as stated or for its omission, does not embrace it as applied to the other, and the only question before the Appellate Court is upon the order or judgment upon the exceptions appealed from.

5. COUNTY COURTS—*Original Jurisdiction in the Administration of Estates.*—The County Court is a court having original jurisdiction of the settlement of estates. When appeals are taken from it to the Circuit Court, that court exercises appellate jurisdiction, and acting as an appellate court it can entertain no matter not before the County Court, and not appealed from.

Elder v. Whittemore.

6. PRACTICE—*On Appeal from a Final Order Approving an Administrator's Report.*—The trial of an appeal from an order overruling exceptions to an administrator's report and approving the same, in the Circuit Court, is *de novo*, but a new case, by amendment of, or addition to the exceptions filed in the County Court, can not properly be made.

7. EXCEPTIONS—*To Administrator's Report—Practice.*—Under an exception to an administrator's report "because the commissions charged by said administrator are excessive," evidence tending to show that he had received interest and made profits not accounted for, is not admissible.

8. ADMINISTRATORS—*Power of County Judge to Fix Commissions.*—The county judge, from his familiarity with the affairs of an estate, with the labor and difficulty attending its settlement, and with the amount of any former allowances he may have made, enjoys peculiar means of knowledge for determining what would be the proper amount of compensation to be made to the administrator for his services. And when such judge, in view of all circumstances, exercises his judgment in the matter and determines what is the proper compensation to be allowed to the administrator for his services, it must be a plain case of the wrongful exercise of judgment which would justify another court in increasing such allowance.

9. ADMINISTRATORS—*Commissions on the Moneys in the Hands of Heirs.*—Where an administrator settled with the heirs of the deceased, paying them the amount of their distributive shares, less certain amounts owing by them to the estate, taking their receipts for the whole amounts, *it was held*, that he was entitled to his commission on the amounts owing by the heirs to the estate.

10. ADMINISTRATORS—*Right to Commissions in Cases of Foreclosure.*—Where an administrator held a deed absolute in form, but under an agreement to reconvey it upon payment of the notes, they having been paid only in part, the administrator treated the deed and agreement as a mortgage and filed a bill to foreclose; bought in the property at a sale under the decree for \$7,500, being less than the amount of the decree, and afterward conveyed it to the heirs. *It was held*, that he was entitled to commissions upon the sum for which he obtained the property.

Memorandum.—Administration of estate. Error to reverse an order entered by the Circuit Court of Sangamon County, approving an administrator's report on appeal from the County Court; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

The opinion states the case.

BRIEF FOR PLAINTIFFS IN ERROR, PATTON & HAMILTON,
ATTORNEYS.

An administrator must account for interest and profits received by him on funds in his hands belonging to the es-

tate he represents. *Rowan v. Kirpatrick et al.*, 14 Ill. 1; *Whitney v. Peddicord*, 63 Ill. 249; *Hough v. Harvey*, 71 Ill. 72; *Curtis v. Brooks*, Id. 125; 7 Am. & Eng. Ency. 426; *Field et al. v. Gatton*, 7 App. 379; *Schouler on Exs. & Adms.*, Sec. 538; 11 Am. & Eng. Ency. 398.

They are mere trustees, and should account for all interest and profits derived from the fund. *Bond v. Lockwood*, 33 Ill. 221; *Ogden v. Larrabee*, 57 Ill. 398; *Asay v. Allen et al.*, 124 Ill. 391; *Lehmann v. Rothbarth*, 111 Ill. 185.

Appeals are allowed from all judgments, orders or decrees of the County Court, in all matters arising under the administration act, to the Circuit Court. Sec. 124, Chap. 3, *Starr & Curtis*.

And such appeals shall be tried *de novo*. Sec. 240, Chap. 37, S. & C.; *People ex rel. v. Prendergast*, 117 Ill. 588; *Randolph et al. v. People*, 130 Ill. 533.

The County Court, in the settlement of estates, has equitable as well as legal powers. *Dixon v. Buell*, 21 Ill. 203; *Hurd v. Slatter*, 43 Ill. 348; *In re Steel et al.*, 65 Ill. 322; *Wadsworth v. Connell et al.*, 104 Ill. 369; *Brandon et al. v. Brown*, 106 Ill. 519; *Millard v. Harris*, 119 Ill. 185; *Covington Estate*, 124 Ill. 363.

BRIEF FOR DEFENDANT IN ERROR, CONNOLLY & MATHER AND BROWN, WHEELER & BROWN, ATTORNEYS.

The plaintiffs in error exhibited their exceptions, ten in number, in the County Court. From the judgment overruling these exceptions they appealed to the Circuit Court. These exceptions presented the only issue for the Circuit Court to try. The Appellate Court could form no other issue. The order appealed from was separate and distinct from every other question arising on the administrator's report. *Curtis v. Brooks*, 71 Ill. 125; *Morgan, Adm'r, v. Morgan*, 83 Ill. 196; *Millard v. Harris, Ex'r*, 119 Ill. 185; 17 Ill. App. 512.

Each item and claim in the administrator's account depended alone on its own merits, having no connection with the other items, and when allowed and no appeal taken, can

Elder v. Whittemore.

not be questioned, unless possibly for fraud or mistake. We call the attention of the court to the case of *Kingsbury v. Powers*, 131 Ill. 182.

The County Court, in making the allowance of commissions to an administrator, is the best judge of what is fair and reasonable, and there should appear a plain case of the wrongful exercise of judgment before another court would be authorized to change it. *Askew v. Hudgens*, 99 Ill. 468.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Defendant in error was appointed May 12, 1885, and administered an estate of nearly \$300,000, consisting mainly of notes secured by mortgage and some municipal bonds. His first report was filed June 28, 1887, his second February 11, 1889, and his third and final, February 26, 1890. Upon the coming in of the last, plaintiffs in error, heirs of the deceased, filed exceptions to all, which were overruled by the County Court and an order made discharging the administrator from further liability. An appeal was taken by the heirs to the Circuit Court. In the course of the investigation there, these reports were amended in certain particulars relating to the matters involved, most of the exceptions overruled, and an order made requiring the administrator to make up and submit to the court an itemized and detailed account of all receipts, payments, outlays and disbursements by him as administrator of said estate from the commencement of his administration. In pursuance thereof he filed his report October 5, 1892, which was approved and the administrator discharged, whereupon the heirs sued out this writ of error.

It is claimed that the Circuit Court erred in refusing to admit evidence that defendant in error loaned money of the estate in his hands at interest and failed to account for it, and also evidence that he used such funds in his private business and made profit therefrom.

Defendant in error was cashier of the State National Bank of Springfield, and it is said his reports as administrator show that, during all the time from the close of the

first year of his administration until the final distribution he must have had in his hands moneys of the estate amounting to a hundred thousand dollars, and that from the facilities afforded by his position as a banker for making loans it is to be presumed that he so used more or less of this fund. He was asked on the hearing, if he did not loan out the money he collected as administrator and get the interest on it, and if he did not put the money so collected and mix it with his private funds, and keep the account in his individual name in the bank and check it out in that way in his own personal business; to which questions and each of them objection was made and sustained, and to these rulings exception was duly taken.

There is no doubt of the liability of an administrator, as of any other trustee, to account for interest or profit actually received or made from the trust fund in his hands, nor is any question or concession made of the strength of the presumption from the fact stated, that the defendant in error had actually received such interest or made such profit in this case. The ground of the objection and of the ruling was that not one of the ten exceptions filed in the County Court related to the subject-matter of these questions, and that matter therefore was not relevant to any issue before the court.

To obviate this objection, plaintiffs asked leave to file additional exceptions, but the court refused to grant it; which is the principal cause of complaint by the plaintiffs in error.

The jurisdiction of the County Court in this matter was original. (Art. VI, Sec. 12 of the Constitution.) That of the Circuit Court was appellate only. (R. S., Ch. 3, Sec. 124.) The report in question was a final report. It purported to present to the court an account of the entire administration, for its judgment and approval, and the discharge of the administrator from further liability as such. The heirs denied that it was true and just. But according to the settled practice they could not do so by an objection in the nature of a plea of the general issue, putting upon

the administrator the burden of proving each and every item. In making his report he had acted under oath and bond to make it full, just and true. It could hardly be that in any such case there would not be many items that would be true, satisfactorily proved by accompanying vouchers or other evidence, and admitted by those interested in the estate and its settlement. Therefore they should be and are required to specify such as are intended to be questioned by particular exception thereto. These exceptions may be as well for what is claimed to be improperly omitted from the report as upon what is claimed to be untrue stated therein. If they are overruled and the report approved, the order of approval, though general in terms, is understood to be specific as to each item stated, and the omission of each, the statement or omission of which was made the ground of a specific exception. Each of these items is separate and distinct from all others, and the order of approval as applied to one is wholly independent of the same as applied to others. In short, the only issues made are upon such specific exceptions. Hence an appeal from the order as applied to one item, whether the exception be to the item as stated or for its omission, does not embrace it as applied to any other, and the only questions before the Appellate Court are upon the order or judgment upon the exceptions appealed from. These propositions seem to be well sustained by repeated decisions. *Millard v. Harris*, 119 Ill. 185; *Morgan v. Morgan*, 83 Id. 196; *Curtis v. Brooks*, 71 Id. 125; *Harris v. Millard*, 17 App. 512. The same rule is applied to accounts of guardians. *Kingsbury v. Powers*, 131 Ill. 182.

The order of the County Court was a final judgment of the only court having original jurisdiction of the matter, upon all the questions that plaintiffs in error saw fit to raise therein. They did not involve any claim that defendant in error had actually received any interest or made any profit from the trust fund. That court might have entertained such claim and exercised its equitable as well as its legal powers to ascertain the facts relating to it. Such claim

would have been entirely separate and distinct from any that were made. No reason is perceived why it was not then made. All of the facts and presumptions on which it was sought to be made in the Circuit Court were as well known as they have since come to be. Even after the final order was made, that court, in the exercise of its equity powers, might have corrected the account for fraud or mistake.

But we do not know of any authority or power in the Circuit Court, purely appellate, to entertain, on appeal, this new and original claim for interest and profits. The trial of what was properly triable in that court was *de novo*, but a new case by amendment of or addition to the exceptions filed in the County Court, could not properly be made. *Bennett v. Hannefin*, 87 Ill. 31, the only Illinois case cited for plaintiffs in error upon this point, which holds that a guardian's report which is simply an account of his receipts and disbursements, does not purport to be final nor ask for a discharge, nor make any claim for commissions, and the order of the court approving the same, will not be regarded as a final settlement of his account and can not be urged as a bar to a citation for a final accounting, does not seem to be pertinent. The question here relates to the extent of the power of the Circuit Court upon appeal from the order of the County Court on exceptions to a report of the administrator which is conceded to have been a final report.

But the first exception filed was "because the commissions charged by said administrator are excessive," and it is insisted that as bearing upon the question thereby raised, evidence of his receipt of interest and profits from the trust funds for which he failed to account was admissible; that in determining the amount of commissions to be allowed, the court should consider whether he has been faithful to his trust, and how much of the estate he has wrongfully appropriated to his own use, and deduct it from what would otherwise be allowed for commissions, by set-off and penalty.

This would have been to do indirectly what the court had no power to do directly—really, to take original jurisdiction in a matter of settlement of the estate of a deceased person

Elder v. Whittemore.

and of the accounts of the administrator, which the constitution gives to County Courts only. Could the evidence have been heard, and had it established the fact that he had received interest and made profits not accounted for, it would have been the duty of the court to charge him with the amount so made and received, as part of the estate, without reference to the question of commissions, and then allow him for commissions as on the whole case should appear to be just, upon the value of the estate as increased by the charge. And while it may be that upon exception sustained for omitting to charge himself with interest and profits, the court might have considered that fact as affecting his claim for commissions, we apprehend the converse of that proposition is not true. Under an exception for excessiveness of commissions charged upon the value of the estate reported, it would not be competent to show a substantive and distinct part of the estate received by him but not reported.

Defendant in error was allowed by the County Court for commissions six per cent on the amount of the personal estate, which is the maximum authorized by the statute. R. S., Ch. 3, Sec. 132.

It is said that considering the magnitude of the estate and the fact shown that it was in such condition as to be settled with comparatively little difficulty or labor, this allowance was unreasonable.

While we would have been quite as well satisfied if it had been five or even four per cent, yet both of the courts below having approved it as it was claimed, we do not feel qualified to reduce it on the general ground stated.

In *Agnew v. Hudgens*, 99 Ill. 468, the Supreme Court, reversing the judgment of the Appellate Court, which affirmed that of the Circuit increasing the amount allowed for commissions by the County Court, said: "The county judge, from his familiarity with the affairs of the estate, with the labor and difficulty attending its settlement, and with the amount of any former allowance he may have made, enjoys peculiar means of knowledge for determining what

would be the proper amount of compensation to be made to the administrator for his services. And when such judge, in view of all circumstances, has exercised his judgment in the matter and determined what is the proper compensation to be allowed to the administrator for his services, it should be a plain case of the wrongful exercise of judgment which would justify another court in increasing such allowance."

A bond in half a million of dollars was required of the defendant in error; his responsibility was very great and his work, as exhibited by his reports, shows ability and care, which in all lines command and deserve a proportionate compensation. We would require as plain a case of the wrongful exercise of judgment by the County Court, to decrease as to increase the amount of its allowance, and we can not well say this is plainly such a case.

The ground of the second exception was that the defendant in error charged commissions on moneys in the hands of the heirs, and which never passed through his hands as administrator. It appeared that several of the heirs were owing the decedent different amounts, aggregating about \$26,000. The administrator made satisfactory settlements with them and paid to each his distributive share, less what was so owing the estate, and took his receipt for the full amount of such share. And thus it is true that this indebtedness was not actually paid into his hands. But it is clear that for all purposes of law and right, he collected and disposed of it for the estate and as administrator. To have received it with one hand as assets and paid it back with more, as distributive share, with the other, would have been an idle and superfluous ceremony, which the law would not require. We think the court properly treated it as part of the estate in his hands.

The sixth exception was for charging commission on the proceeds of the sale of certain real estate of Isaac H. Gray. Decedent, holding notes of Gray, received from him a deed of said property, absolute in form, but under an agreement to reconvey it upon payment of the notes. They had been paid only in part. The administrator treated the deed and

Sanner v. Smith.

agreement as a mortgage, filed a bill to foreclose, bought in the property at a sale under the decree for \$7,500—being less than the amount of the decree—and afterward conveyed it to the heirs. The question is as to his right to charge commissions upon the sum for which he obtained the property. It is contended that the transaction between decedent and Gray did not constitute a mortgage, but a sale upon condition; and that it became absolute upon default of Gray to pay, as provided by the agreement, so that the title was already in the heirs of decedent when the bill to foreclose was filed, and the foreclosure proceedings wholly unnecessary.

It appears that the administrator acted under and in pursuance of advice of counsel. We think their advice was proper, and that the transaction amounted to a mortgage. The heirs could not hold the absolute title to the land while the administrator held the unpaid notes of Gray. We see no error in allowing the commissions complained of in this exception. And no others being urged in argument here, the judgment of the Circuit Court will be affirmed.

Edward B. Sanner v. Sexton E. Smith.

1. *CONVEYANCES—Reformation of Deeds—Mutual Mistakes.*—A sold a tract of land to B, and intended in the deed to make a reservation of certain crops. The scrivener employed by both parties to prepare the deed was instructed to reserve the crops, but without the knowledge of A, and by mistake, he omitted to do it. When the deed was completed A did not read or examine it, being informed that it was all right, signed and executed it, and in ignorance of the mistake delivered it to B. *It was held*, that the mistake was mutual, and that A was entitled to have the deed reformed in a court of chancery.

2. *CHANCERY PRACTICE—Presumptions in Support of Decrees.*—Where a case is heard before a judge, sitting as a chancellor, the presumption is that he considered only such evidence as was proper.

Memorandum.—Bill in chancery to reform a conveyance, and for injunction. Appeal from the Circuit Court of Macon County; the Hon.

FERDINAND BOOKWALTER, Judge, presiding. Decree for complainant. Heard in this court at the May term, 1893, and affirmed. Opinion filed October 28, 1893.

The opinion states the case.

APPELLANTS' BRIEF, GEORGE D. CHAFEE, BUCKINGHAM & SCHROLL AND W. C. JOHNS, ATTORNEYS.

Before a court of equity will take cognizance of an alleged mistake, it must be shown to have been mutual, shared in by both parties, unintentional, not as one intended, and free from negligence. 15 Am. & Eng. L. & Eng. Ency. 628.

Mistake of agent no cause to rescind. Conner v. Greenup, 75 Ga. 277.

It must be such that ordinary diligence would not have prevented. Bonny v. Stoughton, 122 Ill. 536.

Neglecting of opportunity to know, bars relief. Wood v. Price, 46 Ill. 439.

Strength of evidence required, "Clear and overwhelming." Mundenhall v. Steckel, 48 Am. Rep. 281.

"Clear, precise and indubitable." Sylvius v. Kosck, 117 Pa. St. 67.

"Clear and satisfactory." Rupprer v. McConnell, 17 Ill. 212.

"Strongest and most convincing." Hunter v. Blyen, 30 Ill. 228.

"Must be proven as satisfactorily as if admitted." Ford v. Joyce, 78 N. Y. 618.

To justify the reformation of a written instrument upon the ground of mere mistake, the alleged mistake must be one of fact and not of law, must be proved by clear, entirely satisfactory evidence, a mere preponderance of evidence not being sufficient, and the mistake must be mutual and common to both parties to the instrument. Oswald v. Sproehnle, 11 Brad. 368.

Where a party seeks to rectify a written instrument on the ground of mistake, the rule is, the evidence must be such as to leave no fair and reasonable doubt upon the mind that

Sanner v. Smith.

the instrument does not embody the final intention of the parties. *Sutherland v. Sutherland*, 69 Ill. 481.

Rectification can only be had where both parties have executed an instrument under a common mistake and have done what neither intended. *Kerr on Fraud and Mistake*, 421; *Diman v. Providence R. R. Co.*, 5 R. I. 130; *Lyman v. United Ins. Co.*, 17 Johns. 373.

Chief Justice Lawrence:

"A deed will not be reformed by the decree of a court, so as to make it express something entirely different from what was written on its face, except upon evidence of the clearest and most satisfactory character." *Palmer v. Converse*, 60 Ill. 313.

The rule is exceedingly strong. *German Ins. Co. v. Danes et al.*, 131 Mass. 346.

It must appear beyond reasonable doubt that the precise terms of a contract orally agreed upon, when reduced to writing, expresses a different contract. 15 Am. and Eng. Ency., 650.

Judge Wall, of this court, lays down the same rule.

"Where it is sought to reform a written instrument upon the ground of mutual mistake, it is necessary for complainant to clearly and satisfactorily establish the mistake alleged, and relief will not be granted where the evidence is loose, equivocal or contradictory, or is in its texture open to doubt or opposing presumptions. Reformation will not be made on a mere preponderance of evidence, but only upon a certainty of error." *Warrick v. Smith*, 36 Ill. App. 619.

MILLS BROS. & MILLS, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was a bill filed by appellee to reform his deed to appellant, so as to reserve the rent corn on the premises conveyed, and in the meantime to restrain a replevin suit brought by the grantee of said corn. It averred that by the

agreement of the parties it was to be reserved but the provision was, by mistake, omitted from the deed. The material averments were denied by the answer, to which a replication was filed, and on final hearing upon the pleadings and proofs a decree was entered according to the prayer of the bill, from which this appeal was taken.

Appellee owned Sec. 18, T. 14 N., R. 3, east of the third P. M., and was endeavoring, through Johnson & Knight, real estate agents at Decatur, to effect the sale of it. It was subject to a mortgage for \$22,000, dated June 29, 1887, and due July 1, 1892, with interest at seven per cent, payable semi-annually, July 1st and January 1st of each year.

On September 10, 1888, Johnson obtained from his brother-in-law, the appellant, the following offer :

"Sept. 10, 1888, proposition I now make to S. E. Smith for the S. $\frac{1}{2}$ of Sec. 18, Tp. 14 N., R. 3, E. 3rd P. M. I will agree to pay \$10,000 for the same, and will assume the mortgage now on the place and take a second mortgage on the balance, and will also advance \$2,000 cash. Interest to commence March 1, 1889. Taxes to be paid by S. E. Smith for 1888. (Signed) E. B. Sanner."

The half section described was then occupied by tenants whose terms extended to March 1, 1889. They had one hundred and thirty or forty acres in corn, of which two-fifths were to be delivered for rent. It was a good crop, about mature and ready to be gathered.

By the terms of the proposition the vendor would become debtor to the vendee to the amount of \$3,000, upon the assumption that the premises were to bear half of the mortgage debt mentioned, which was to be secured by a second mortgage, but when to be payable, with what interest, if any, or upon what property, is not indicated. For it could not have been intended that Sanner should accept as security the property he was proposing to buy, nor, for the reason that Smith was also intending to sell the other half of the section, that he would give it upon that. Sanner knew that the premises were occupied by tenants. Whether he knew the terms of their lease or not, does not appear,

Sanner v. Smith.

but the proposition contained no reference to the questions of possession or rent. Johnson had written it hurriedly, after a talk with Sanner and in his presence, and it was manifestly incomplete, leaving several matters to be yet arranged before a satisfactory deed could be made.

On the same day Johnson showed or read it to Smith, who did not object to it for anything it did not contain, but was not satisfied with the price offered nor with the date from which interest was to be paid on the mortgage to be assumed, and therefore declined to accept it. Johnson then talked with Sanner again, and with his consent \$200 was added to the price and the date changed from March to January; after which Smith signed the following, thereunder written: "I accept the above proposition." Johnson sent notice thereof to Sanner, who then came and saw him about procuring the \$2,000 to be advanced and preparing the deed, notes and mortgages, and left him to attend to it. On the 17th, Smith and his wife went to Johnson's office to execute the deed; Smith examined it only far enough, as he says, to see that the description covered the land intended, having the fullest confidence in Johnson's knowledge and care. He asked him, however, to read it to his wife, but Johnson only explained it generally to her and in his own language. It was in the statutory form, excepting that the premises were made "subject to \$12,700, together with interest that may accrue on same from and after January 1, 1889, the same being part of a certain mortgage note," etc., as hereinbefore described, and also declared that "the grantor assumes all taxes against the above described land for the year 1888."

At the same time a like deed of the north half was executed to Silas E. Warrick, upon a like proposition, subject to \$9,300, being the residue of said mortgage debt.

Soon afterward Johnson informed Sanner of the execution of the deed, and was told by him to have it recorded. He never saw it until it was left for record, which was on September 20, 1888. He did see it at the recorder's office on that day or the next.

About the middle of October, when the tenants were

gathering the corn, appellant, following the example of Warrick, claimed the rent portion, and upon demand and refusal of it, brought an action of replevin for it; and thereupon this bill was filed.

In a like case against Warrick, a decree was made upon the pleadings and proofs in favor of the complainant, which was affirmed on appeal, both by this court and the Supreme Court, as reported in 36 App. 619 and 137 Ill. 504.

The questions of fact involved in these cases—whether it was the intention of the parties that the deed should contain a reservation of the rent corn and its omission was a mistake of fact, also mutual and without fault of the grantor, and the rule of law as to the measure of proof required of complainant—were the same. Upon the assumption that such was the intention of the grantor, we think the opinions referred to are decisive that the omission was a mistake of fact and without *laches* on his part, since we understand from this record that the evidence bearing upon those questions were substantially if not precisely the same, and it is conceded that in each of those opinions the rule as to the measure of proof was well stated.

This leaves for our consideration the question whether such intention and mistake are chargeable to the grantee also.

For appellant it is contended that upon these questions the Warrick case was widely different from this.

As to the intention, all the difference suggested is claimed to be shown by the following quotation from the opinion of the Supreme Court: "*The parties agreed in advance of the execution of the deed, that the vendor should have the portion of the crops due him for rent. Johnson gave Warrick to understand that the crops were reserved. Warrick admitted this to a number of witnesses.*" The italics are counsel's, and must have been intended to indicate the language which they claim could not be applied to appellant in this case.

It is evident that the quotation is a statement of the court's conclusions from the evidence, and in view of the

Sanner v. Smith.

rule requiring such a full measure of proof. It is immediately preceded by the statement of that rule, and of the fact that the court had "examined the evidence with some care." The last sentence in the quotation is also immediately followed by this statement: "The agreement for the reservation of the crops by the vendor is established by the testimony of appellee, of Johnson, of Jordan L. Smith and of at least two other witnesses, while over against it stands the testimony of Warrick alone, who never thought of claiming the crops until he subsequently discovered that Johnson had accidentally omitted from the deed a clause reserving them to the grantor. That this omission was a mere oversight is satisfactorily shown by the evidence of S. E. Smith and Johnson." Every sentence in the quotation by counsel has reference to the alleged agreement and to the evidence of it in positive statement on one side and admissions on the other.

We have not examined the evidence in the Warrick case since it was decided in this court, but from general recollection, and what appears in this record, we think the likeness so close that by substituting the name of appellee for that of Warrick, and for the word "alone" the words "and his brother," quoted from that opinion by counsel or by us, it can be literally applied here. The conclusions might indeed be wrong, but it is supported and opposed as stated, and as a description of this case upon this point it would be entirely accurate so far as it goes.

We do not propose to do more than to state the substance and effect of the evidence, as it strikes us; nor is more necessary in order to show this likeness.

Appellee testified that he had told appellant what he could have the land for per acre, but that he (appellee) wanted the corn.

Johnson testified that he well knew from repeated expressions of appellee, that in any sale he might negotiate, the corn was to be reserved, and that he clearly gave appellant so to understand; that he told him Smith had been holding the farm at \$45 per acre, but he (Johnson) thought it could

be bought for \$40, and possibly a shade less; that the land itself was worth \$40 per acre; that the offer proposed was considerably less, but that there was a good crop on the land, which would make it realize to appellee about that amount.

That he so understood it is almost conclusively shown by the fact that as soon as he learned that Sanner was claiming the corn he went with Smith to see him, and expressed his opinion of it in terms which, considering that they were addressed to a brother-in-law and in the presence of his wife, were remarkably forcible. Sanner himself says that he threatened to break him up if he could, in case he persisted in the claim.

Jordan L. Smith (a tenant of the Warrick land, who had been a witness in that case also) testified at length to a conversation with appellant about the 16th of October, in the course of which he asked him if he understood when he purchased the land that he purchased the corn, and that appellant said he didn't suppose the other parties intended it that way, but they had not put it in the deed; that there had been a verbal reservation, but Johnson had failed to put it in the deed; that if Warrick could hold the corn on the part he bought, he (Sanner) could hold it on his part, and he intended to try to do so; that Warrick wanted him to hold it; that there had been trouble between him (Sanner) and Smith in regard to title before that, and he intended to hold it to get even with him.

Appellant testified that Johnson had told him, as an inducement to buy, there was a good crop of corn on the land which would help to make the first payment, and that he would not have bought the land without the crop. In view of that testimony, we think there is significance in that of John McCarthy, his two sons and George E. Knight, the partner of Johnson.

John McCarthy says he asked appellant if he had bought the corn, and the reply was that he had not directly bought the corn, but it wasn't put in the deed, and he was going to hold it if he could.

Sanner v. Smith.

J. W. McCarthy says that in October, while they were husking, Sanner said he ought to have looked after it a little sooner; that if the corn was his he wanted it, and if not, to let the law divide it. C. H. McCarthy says that after they began to gather the corn Sanner came to the house and claimed it. He said it was not reserved in the deed, but he thought it belonged to him.

George E. Knight says that about the first of January after the sale Sanner asked him whether Smith was ready to pay the interest on the \$4,500, and he told him he was not; that he expected to make the money out of the crop, and was trying to hold that; and Sanner simply said "I am going by the deed."

Appellee says that when appellant came to demand the corn, just before the replevin suit was commenced, he asked him if he thought it belonged to him, whether he bought it, and he answered, "That is what the deed says;" that he was arguing it was not in the deed, and that he made no claim for it except that it was not in the deed.

It does not appear that at any time before he testified on the hearing, appellant told anybody there was no understanding that the crop was reserved, that anything had been said about the crop in the negotiation, or that when he bought the land he expected to get the crop. He does not appear to have claimed any right in equity to it, but in every instance expressly put it on the technical ground that it was not reserved by the deed, in a way and under circumstances which seem to indicate that he knew its omission was an oversight of the scrivener. The plain people, the McCarthys, knew he had bought the land but could not have possession before the following March; that the year's rent had been substantially earned; that the corn was mature, and that they were about to gather or actually gathering the rent portion for their lessor, the appellee; yet the appellant was claiming it. They had received no notice from appellee that he had transferred the rent and naturally inquired of the claimant as to his "understanding" about it. Had he innocently relied on his deed would he have answered with a

doubt, that he was going to hold it "if he could," that "if it was his he wanted it," and that he "thought" it belonged to him, and all because and only because it had not been reserved "in the deed?" But besides the facts thus known to them he knew also that by his proposition he was to pay nothing down for the land but only assumed a mortgage debt not due for nearly four years; that he was not to pay any interest on it for nearly a year and then for only so much as accrued from March 1, 1889, when the tenant's lease would expire and he would first get possession, and that his grantor was to pay all the taxes on it for the year 1888. Did he suppose that appellee intended also to give him the corn then about to be delivered for the rent of that year, already substantially earned? No wonder that he made no claim of such an actual understanding, but stood upon the deed alone, and doubted whether he could hold it.

In the light of the circumstances we may understand his uniform statements that it was not reserved in the deed as requiring that the emphasis be put upon *the deed*, and implying an admission that it was reserved, as in Jordan Smith's testimony, verbally.

Appellant also doubted whether Warrick could hold the rent corn on the land he bought. He told Jordan Smith that he had so told Warrick. Their cases were certainly much alike, and it may be inferred that it was upon such testimony as that of the McCarthys herein, in part at least, that the Supreme Court based the statement that Warrick had admitted such an agreement "to a number of witnesses." In that respect also, then, the similarity in the cases for complainants is very striking, the difference being that there the number was four while here it is five.

The only other difference is in those of the defendants, being that appellant here was corroborated in part by one witness, and Warrick stood "alone." Jacob Sanner says he was present and heard all of the conversation between Johnson and appellant when the proposition to purchase was drawn up and signed; and that, as an inducement to appellant to buy, Johnson told him "there was a good

Sanner v. Smith.

crop on the land and it would help make a good payment on the land." This witness was a brother of appellant. Unless he was closely attending to the conversation he might have got the impression stated from Johnson's own version of what he said, which was that the crop would help to bring to Smith nearly the price he wanted, and not that it would help Sanner to pay the lesser price he was proposing to offer. But giving it all the effect that can be claimed, it affects only the comparative weight of the evidence for and against the allegation of an agreement that the corn should be reserved, and left the court to decide whether, notwithstanding such corroboration of the defendant, the complainant had furnished the measure of proof required.

It is also true of this case, as was said of the other, that appellant made no claim to the corn until after he discovered that it was not reserved in the deed. Counsel assert the contrary, but we think they are mistaken. They do not refer to any evidence in support of the assertion, nor do we find any in the record. He says he saw the deed as early as the 21st day of September, and the earliest claim shown was in October, probably near the middle.

The remaining question is whether the mistake in the deed, if it was a mistake, was made by appellant as well as by appellee.

In the Warrick case the Supreme Court found the proof to be that the scrivener in drawing up the deed acted for both the parties and by their direction. It appeared that Warrick paid him \$100 to act for him, and was held to be thereby estopped to deny the agency. There was no such evidence here. But one may in fact act for another and by his direction, without compensation, and bind him by his action, even though he be the paid agent of the adverse party in interest.

Here Johnson was clearly the agent of Smith, as was perfectly understood. He was, however, a brother-in-law of Sanner and on good terms with him until after the deed was executed.

As a part of the transaction Sanner was to advance \$2,000 in cash and have a mortgage security for \$4,500. He did not have the money. Johnson offered to procure or try to procure it for him and he consented to have him do so. Johnson found a lender. His firm indorsed Sanner's notes for it and on them obtained the money of Mr. Lyon. Johnson's business made him familiar with notes, deeds and mortgages. From their relations and this known familiarity, Sanner might well trust him to prepare the papers; and he did so trust him. His own statement is "Johnson offered to write up the papers, and I probably told him to get them up. I left it to him to see that the papers were gotten up correctly, and relied upon him to do it. He told me he had all the papers fixed up and I told him to put them on record. When I came up here on the 21st they were on record. I hadn't seen them before that. Believing and relying upon Johnson, I didn't have anybody look at the papers." Thus, though deeply interested in the deed of the half section and in the mortgage to secure to him the \$4,500, he did nothing in person to see for himself that they were satisfactory, but he did by another, of his own appointment for that purpose. He left it entirely to Johnson, and accepted his work without examination. Johnson swore that the omission of the reservation clause from the deed was a pure mistake or oversight on his part, acting for Sanner at his instance as well as for Smith. That mistake or oversight is therefore imputable to him, as was held in the Warrick case.

The witnesses were examined orally. The chancellor saw and heard them. No complaint is made of his rulings on the hearing, except in admitting evidence of complainant's declaration of his intention to have the corn reserved, made to divers persons in the absence of the defendant. They would be competent and proper if they were communicated, in substance, to Sanner before the deed was executed. The presumption is that the chancellor considered only such evidence as was proper. Whether those declarations were considered or not we do not know, nor do we think it material. It is sufficient if Johnson gave Sanner to under-

Rogers v. Rogers.

stand that the reservation was intended. The court must have found that he did so, and that the proof was sufficiently clear and satisfactory. Being ourselves of the same opinion, the decree will be affirmed.

Noah T. Rogers v. Sarah E. Rogers.

51	683
79	616
51	683
180s	508

1. **PAUPERS**—*Support of by Relatives.*—Under Chapter 107, R. S., entitled "Paupers," the mode of enforcement through the medium of the state's attorney and the overseer of the poor by summary proceedings in the county court, is the remedy where the pauper becomes a public charge through the failure of relatives to render the necessary support. When such support is rendered by one of two, or more, who are jointly bound, the remedy is properly sought in chancery.

2. **JURISDICTION**—*In Chancery—To Adjust the Whole Controversy.*—A court of chancery having the parties before it may properly proceed to adjust the whole controversy. *So held*, where a wife, divorced from her husband, filed a bill to compel him to contribute to the support of a crippled daughter, as to past liability, as well as for future support.

Memorandum.—In chancery. Bill to compel to the support of dependent relatives under the pauper act. Appeal from the Circuit Court of Jersey County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1893, and affirmed. Opinion filed November 27, 1893.

STATEMENT OF THE CASE.

This was a bill in chancery by appellee against appellant. The cause was heard upon bill, answer, replication and proof, oral and record, and a decree was entered, finding "that on or about the 15th of March, A. D. 1849, the complainant and defendant were lawfully married, and, as a fruit of said marriage, there was born to them a daughter, named Laura Rogers, and several other children, and that, afterwards, to-wit, on the 1st day of October, A. D. 1892, in a certain suit in chancery in said Circuit Court, wherein said defendant, Noah T. Rogers, was complainant, and this complainant, Sarah E. Rogers, was defendant, a decree

of divorce was granted and entered, dissolving the bonds of matrimony existing between the complainant and defendant herein, and that, in said decree so granted and entered, no provision was made for the custody, support and maintenance of said daughter Laura, and that said daughter Laura, continually, from birth, has had no use of her legs and feet, and she has been entirely helpless, requiring the care and attention of the complainant; that said daughter Laura is unable to earn anything for her own support, and is entirely destitute of any means of support whatever, and that she is now about forty-three (43) years old, and that, for a part of the time, it requires two persons to move and lift her as her necessities require; that for the past five years the complainant has cared for said daughter Laura, and furnished her with food, clothing, medical attendance, and all of the necessities of life, and the additional help to care for her wants and necessities; and that the defendant, Noah T. Rogers, has not, during said five years last past, contributed anything whatever toward the support, maintenance, attendance upon, clothing, medical attendance or otherwise, of said daughter Laura, though requested so to do prior to the commencement of this suit; that the defendant is not situated so that he can properly care for said daughter Laura, and she desires to remain with and have the care of the complainant, her mother, and that said daughter Laura requires the attendance of persons of her own sex. That the defendant is the owner of a valuable farm of one hundred and thirty (130) acres, described as follows, to wit: The south half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) and fifty acres off of the north end of the west half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$), both of said tracts lying and being in section No. eleven (11), in township No. seven (7) north, range No. twelve (12), west of the third principal meridian, in the county of Jersey and State of Illinois, all of the value of \$6,000, and that said defendant, Noah T. Rogers, is able to contribute toward the support of his said daughter Laura. That it is, and has been for the past five years, reasonably worth \$260 per year to furnish food,

Rogers v. Rogers.

clothing, care and medical attendance of said daughter Laura.

It is therefore ordered, adjudged and decreed by the court, that the complainant retain the said daughter Laura and furnish her the necessary food, clothing, care and medical attendance, and that the defendant, Noah T. Rogers, pay to the complainant, Sarah E. Rogers, as contribution toward said necessary food, clothing, care and medical attendance of said daughter Laura, the sum of one hundred and thirty dollars (\$130) per year, payable in quarterly payments of thirty-two dollars and fifty cents (\$32.50) each, and the first of said quarterly payments to be made to the complainant by the defendant, each and every three (3) months thereafter, on the first day of October, January, April and July, until the further order of this court.

It is further ordered, adjudged and decreed by the court, that the defendant, Noah T. Rogers, pay to the complainant, Sarah E. Rogers, the sum of six hundred and fifty dollars (\$650) within four months of the date of this decree, as a reasonable contribution toward the necessary food, clothing, care and medical attendance of said daughter Laura for the past five years, and that in case the said defendant, Noah T. Rogers, fail or refuse to make either or any of the payments aforesaid as herein provided, that he stands in contempt of this court.

It is further ordered, adjudged and decreed by the court, that this decree and the payments of the sums of money as hereinbefore set forth, be a lien upon the real estate of the defendant hereinbefore described, from the date of filing this decree, and that the injunction heretofore issued in this cause be dissolved; and that the defendant pay the costs of this proceeding, to be taxed by the clerk of this court, and that complainant have execution therefor.

And the defendant excepts to this decree and files suggestion of damages on dissolution of injunction, and damages as attorney's fees, assessed at fifty dollars, and complainant excepts, and the defendant files motion to have said decree made a lien on the real estate of the complainant, and which

said motion is denied by the court, and the defendant excepts, and prays an appeal to the Appellate Court, which is granted upon defendant's entering into bond within thirty (30) days in the sum of \$200 with security to be approved by the clerk of this court, and certificate of evidence to be signed in thirty days by consent."

A. M. SLATEN and ED. J. VAUGHN, attorneys for appellant.

O. B. HAMILTON, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The 1st section of chapter 107, R. S., provides :

"That every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers or sisters of such poor person, if they, or either of them, be of sufficient ability; provided that when any persons become paupers from intemperance, or other bad conduct, they shall not be entitled to support from any relation, except parent or child."

The second section provided that :

"The children shall be first called upon to support their parents, if there be children of sufficient ability, and if there be none of sufficient ability, the parents of such poor person shall be next called on, if they be of sufficient ability, and if there be no parents or children of sufficient ability, the brothers and sisters of such poor person shall be next called on, if they be of sufficient ability," etc., etc.

So far as the decree enforces contribution for the five years preceding, we think there can be no complaint. The statute fixes the liability of the parents. It might perhaps be argued that the father is first liable and then the mother—but the bill concedes and the decree imposes a joint liability—to which appellant should not object. Then the question is as to the provision for future support. The court

Rogers v. Rogers.

having the parties before it, very properly proceeded to adjust the whole controversy. It was apparent that the care of the unfortunate child would be a continuing burden; that as the parents were separated the custody could not be joint, and that in view of the circumstances the mother would be the proper and, indeed, the necessary custodian.

The decree is, like that for alimony and for custody of children in divorce cases, subject to such modification from time to time, as may be necessary, to meet any changes in the situation.

The fact that no precedent for such a decree can be found, is no argument against it, if it is in accordance with the general principles of equity jurisdiction and responsive to the merits. We think it so accords with principle and with justice.

It is urged that the statute points out a mode of enforcement through the medium of the state's attorney and the overseer of the poor, by summary proceedings in the County Court.

This is the remedy where the pauper becomes a public charge through the failure of relatives to render the necessary support. When such support is rendered by one of two or more who are jointly bound therefor, a different remedy would be necessary, and we think it was properly sought in this case. The decree will be affirmed.

ANALYTICAL INDEX.

A

ABANDONMENT—Of motion for new trial—When.....	828
Of assignment of errors.....	828
ABATEMENT—Form of verdict in.....	877
ABSENCE—Of record—Presumptions.....	801
ABSTRACT—Instructions must be contained in the.....	597
Title free from reasonable doubt.....	183
ABSTRACT AND BRIEFS—Failure to file in time—Motion to dis-	
miss.....	75
ACCEPTANCE—Of premium—Estoppel—Insurance.....	252
Of property after an opportunity to inspect.....	226
What is—Drafts.....	168
ACCIDENTS—Immediate causes of—Carriers of passengers.....	808
ACTIONS—Against railroads for damages to real property.....	498
For deceit—Malice.....	574
Personal, suspended—Remedies.....	235
Right of in the owner of the fee—Trespass to real estate.....	620
ACTS—Of next friend—Infants bound by.....	492
ADJACENT OWNERS—Character in which they act—Streets....	353
ADMINISTRATORS—Commissions on the moneys in the hands of	
heirs.....	668
Power of county judge to fix commissions.....	663
Right to commissions in cases of foreclosure.....	663
Character of exceptions to administrator's report.....	662
ADMINISTRATION OF ESTATES—County Court has original	
jurisdiction in.....	662
Exception to administrator's report.....	662
Overruling exceptions to an administrator's report.....	662
ADMINISTRATOR'S REPORT—Exceptions to—Practice.....	663
Practice on appeal from a final order approving.....	663
ADMISSIONS—By letters.....	351
ADVICE OF COUNSEL—Disobedience of injunction upon.....	487
AGENCY—Evidence of.....	684.
AGENT—Of corporation representing it in making a contract with	
himself.....	558

AGENT. Continued.

Principal liable for mistakes of	615
Real estate—When entitled to his commission	622
When not entitled to his commission	622
AGREEMENT —As to solicitor's fees—Dissolution—Damages—Injunction	315
ALLEGATIONS —Of ownership—Pleading	57
AMENDMENTS —How made to pleadings	499
Of bill of exceptions after the term is over	584
ANCIENT DOCUMENTS —Proof of	182
APPEALS —From an order approving administrator's report	662
From a final order approving an administrator's report—Practice on	663
In cases under the assignment act	258
People cases—Waiver	112
To Supreme Court—Striking out remanding order	74
What is brought up	179
APPEAL BOND —Must be filed within five days—Forcible detainer	75
Sureties on—When released	485
APPELLATE COURT PRACTICE —Lost instructions	325
APPELLATE COURT PROCEEDINGS —Errors to be pointed out	323
What will be considered upon an appeal from an order, etc. . .	103
APPEALS FROM JUSTICES —When properly for trial	337
APPOINTMENT —Of receiver—Effect of	517
Of a receiver a peremptory measure	517
Of a receiver—Purpose of	517
What must appear to warrant, of receiver	517
ARBITRATOR —Architect as, in building contracts	198
ARCHITECT —Arbitrator in building contracts	198
Certificate of—Building contract	276
ARREST —In civil case	222
Refusal to surrender estate	222
<i>Capias ad satisfaciendum</i> not a writ of right	222
Body execution—Sheriff's return on property execution	222
ARREST OF JUDGMENT —Defective declaration	512
ASSESSMENT —Upon stock—Corporations	204
Remittances in time—Mutual benefit associations	79
Of damages—Injunction, what is, etc.	483
ASSIGNEE —Charges and expenses—Priority	115
Takes subject to all liens—Assignment for the benefit of creditors	587
ASSIGNMENT —Garnishment affected by	281
Of lease—Transfer of an equitable right to rent	240
Equitable—Rent to accrue—Garnishment	240
Of policy of insurance—Reservation	18
ASSIGNMENT ACT —Cases under—Appeals	258

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—Assignee	
takes subject to all liens.....	587
Effect upon mechanic's lien.....	270
Judgment creditors—Preferences.....	587
Priority of payment.....	115
Acquiescence in continuance of business.....	115
Title to unpaid checks.....	349
What is not.....	249
ASSIGNMENT OF ERROR—Excessive damages.....	323
ATTACHMENT—Fraud—Judgment <i>in rem</i>	17
ATTACHMENT PROCEEDINGS—Fraudulent disposal of property	
—Ignorance no defense.....	17
ATTACHMENT SUITS—Intervenors in—Fraudulent sales.....	579
ATTORNEYS—Notice to, when to clients.....	337
ATTORNEYS AT LAW—Retainer.....	549
ATTORNEY-GENERAL—A proper party in actions against trusts.....	167

B

BAILEE—Estoppel of.....	636
BAR—Former suit pending is not.....	504
BENEFICIARIES—In policies—Insurance—Vested rights.....	18
Right to change—Insurance.....	18
BILL AND ANSWER—Waiver of the right to have the cause heard	
upon.....	538
BILLS—Audit of, by counties.....	190
BILL OF EXCEPTIONS—Amendment after the term is over.....	584
Certificate that it contains all the evidence.....	120
Exhibits must be preserved in.....	477
Motion for a new trial.....	577
Must be sealed.....	581
Must show that it contains all the evidence.....	584
Objections and exceptions—How shown.....	305
Care in the preparation.....	305
Records.....	371
Stipulation as to.....	382
Stipulation as to—Record.....	389, 482
BILLS OF LADING—No shipment, no contract.....	151
BILL OF PARTICULARS—Limitations by.....	146
Not a part of the record.....	146
BONDS—Right to fix the penalty of—Option contracts.....	90
BREACH OF DUTY—Negligence—Street railways.....	308
BUILDING CONTRACTS—Architect as arbitrator.....	198
Architect's certificate.....	276
BUMPING CARS—Negligence.....	507

BURDEN OF PROOF—Forfeiture of insurance policy.....	40
Of showing error.....	577
Instruction relieving the plaintiff of.....	380
Payment.....	641
<i>Prima facie</i> evidence of existing right.....	317
BY-LAWS—Result of unreasonable provisions.....	204
Stockholder presumed to have knowledge of the company's...	204

C

CALENDAR—Short cause—Practice—Waiver of irregularities....	549
CARE—Exercise of ordinary—Negligence.....	595
In approaching railroad crossings.....	597
In the preparation of bills of exceptions.....	305
Negligence.....	335
Ordinary—Comparative negligence.....	626
Ordinary—The term defined.....	626
CARE AND DILIGENCE—Exercise of—Rejection of evidence....	215
Miners at work, etc.....	649
CARE AND NEGLIGENCE—Obligation to use reasonable care can not be delegated—Fellow-servants.....	124
CARRIERS—Common—Right to contract against liability.....	656
CARRIERS OF PASSENGERS—Failure to stop when requested	307
Immediate causes of accidents.....	308
CERTIFICATE—Of architect—Building contract.....	276
That bill of exceptions contains all the evidence.....	120
CERTIFICATES OF INDEBTEDNESS—Purchase of, by stock- holder creditors.....	33
Surrender to assignee.....	33, 33
Effect of stockholders purchasing.....	32
CERTIFIED COPIES—Admissibility—Evidence.....	479
CERTIORARI—When it lies.....	370
CHANCERY—Jurisdiction in, to adjust the whole controversy....	683
CHANCERY PRACTICE—No replication filed.....	538
Objections to master's report.....	538
Presumption in support of decrees.....	671
Waiver of the right to have the cause heard upon the bill and answer.....	538
CHANGE—Of possession on default—Chattel mortgages.....	531
CHATTEL MORTGAGES—Change of possession on default.....	531
Days of grace of notes secured by.....	530
Foreclosure in equity.....	516
Maturity of note secured—Days of grace.....	531
Possession on default—What is not sufficient.....	531
Power to declare entire debt due.....	531
Void when securing notes not maturing within two years.....	530

CHECKS—Title to unpaid checks—Assignment for the benefit of creditors.....	840
CHOSE IN ACTION—Insurance policy is.....	18
CITY AND VILLAGES—Control over streets.....	128
Vacating or obstructing streets—Special damage.....	128
Instructions—Sidewalks.....	595
CITY OF CHICAGO—Control over its streets.....	858
CIVIL RESPONSIBILITY—Of lunatics.....	200
COLLATERAL ATTACK—Fraud—Judgment.....	491, 478
Upon what based—Judgments.....	491
COMMISSIONS—Administrator's right to in cases of foreclosure..	668
On the moneys in the hands of heirs—Administrators.....	668
Power of county judge to fix administrator's.....	668
When real estate agent is entitled to.....	267, 622
When real estate agent is not entitled to.....	622
COMMON CARRIERS—Duty toward passengers.....	308
Right to contract against liability.....	656
COMMON LAW—Evidence at and under the statute.....	215
<i>Non est factum</i> and <i>non assumpsit</i> at—Pleading.....	558
Suits by infants at.....	491
COMPARATIVE NEGLIGENCE—Ordinary care.....	626
COMPENSATION—Of adjacent owner—Streets.....	354
When real estate broker is entitled to.....	248
COMPETENCY—Of witnesses—Evidence of reputation.....	512
Of witnesses, how shown.....	582
COMPROMISE—Offers of, not binding.....	274
CONCLUSION OF LAW—Verdict and judgment are the.....	208
CONCURRENT REMEDIES—Trespass and replevin.....	235
CONDITIONS—Waiver of, in freighting contract.....	656
CONDONATION—Divorce.....	565
CONSIGNOR AND CONSIGNEE—As parties.....	151
CONSTRUCTION—General rules of construction of contracts....	390
Of ambiguous writing—Written instruments.....	351
Of contracts.....	151
Of instruments creating trusts.....	166
Of the statute—Mechanics' liens.....	270
Of statutes—Service of process.....	339
Contracts for conveyances of title.....	186
Of the phrase "Line of goods"—Contracts.....	343
CONTEMPT OF COURT—Proceedings to punish.....	103
Order of committal—Presence of defendant.....	108
Certainty in order of commitment.....	103
Void order.....	51
Disobedience of an unauthorized order.....	52
CONTINUANCE—To a third term—Criminal law.....	112

CONTRACTS—Admissibility of written, in evidence.....	292
Agent of corporation representing it in making a contract with himself.....	553
Between corporations and its officers.....	553
Construction of.....	151
Construction of the phrase "Line of goods".....	343
Director of a corporation with himself.....	552
For specific performance—Requisites of.....	90
Not susceptible of specific performance.....	91
For the withdrawal of opposition to legislation.....	354
Otherwise void, etc.—Public policy.....	354
For carrying out legislation.....	354
General rules of construction.....	390
Application of the rule.....	390
Rights of contracting parties.....	390
Relief from penalties in law courts.....	390
Liquidated damages.....	390
Stipulated damages.....	391
Penalty for non-performance.....	391
Interpretation of doubts.....	391
Unjust and unreasonable.....	391
Identification of things referred to by parol evidence.....	260
Interpretation.....	591
Of insurance—Naming the beneficiary.....	17
Right to contract against liability—Common carriers.....	656
Waiver of conditions in freighting.....	656
Waiver of provisions by an attorney.....	133
When not to be varied by parol.....	351
With reference to by-laws—Stockholders—Buying shares.....	204
Corporation's right to contract for interest—Foreign corporation's same.....	204
Validity—Law of the place—Remedy.....	204
Void and voidable—Ratification.....	553
For conveyances—Inchoate right of dower.....	186
Construction of title.....	186
Of insurance—Notice of the contract.....	18
CONTROL OVER STREETS—City of Chicago.....	352
CONTROVERSY—Jurisdiction in chancery to adjust the whole...	683
CONVEYANCES—Ancient deeds.....	132
Reformation of deeds—Mutual mistakes.....	671
CORPORATIONS—Agent representing it in making a contract with himself.....	553
Contracts between, and its officers.....	553
Director of a, contracting with himself.....	552
Insolvency—Effect of stockholders taking up certificates of indebtedness.....	33
Insolvency—Relation of directors to creditors.....	249
Lease by an officer of, with himself.....	553
Mutual aid associations—Rights of member.....	78

CORPORATION. *Continued.*

Power to contract for interest.....	204
Assessments upon stock.....	204
Ratification by, need not be in writing.....	558
Record of—Evidence.....	205
Stockholders' relation to after failure.....	82
Liability of stockholder of insolvent.....	38
Insolvent—Effect of stockholders purchasing indebtedness, etc.	82
Insolvent—Payment of debt by stockholders.....	82
COUNSEL—Disobedience of injunction upon the advice of.....	467
COUNTIES—Audit of bills, etc.....	190
Audit of bills—What conclusive of.....	190
Power to rescind acts of auditing committee.....	190
COUNTY COURTS—Original jurisdiction in the administration of estates.....	662
COUNTY JUDGE—Power of to fix administrator's commissions..	663
COUNTY ORDERS—Limitations.....	191
COURTS—Discretion of—Short cause calendar.....	274
COURTS OF EQUITY—Extent of jurisdiction.....	517
Forfeitures in.....	182, 284
Foreclosure of chattel mortgage.....	516
Functions of to act as an agent.....	516
Trustee can not shift his burden on.....	517
When trustee may apply to.....	517
Will retain jurisdiction.....	538
COVENANTS—Running with the land.....	62
CREDITORS—Judgment—Assignment for the benefit of creditors —Preferences.....	587
CREDITOR—Stockholder may become a.....	81
CRIMINAL ACTS—Railroad not liable for criminal acts of others.	607
CRIMINAL LAW—Continuance to a third term.....	112
CRIMINAL RESPONSIBILITY—Of lunatics.....	200

D

DAMAGES—Actions against for, to real property—Railroads.....	498
Assessment of—Injunction, what is, etc.....	483
Death from negligent act.....	834
Excessive.....	887
\$5,000 excessive.....	808
\$1,500 not excessive.....	572
\$10,000 not excessive.....	544
Excessive—In Appellate Court.....	76
Inchoate right of dower.....	186
Liquidated—Contracts.....	390
Liquidated and penalties.....	354
On dissolution of injunction.....	815
Power of the jury—Review.....	308

DAY OF NOTICE—What is—Notice by mail.....	40
DAYS OF GRACE—Notes secured by chattel mortgages.....	530
DEATH—From negligent act—Damages.....	334
Presumption of.....	317
DEBT—Power to declare entire debt due—Chattel mortgages....	531
DEBTOR—Right to purchase his own debt.....	32
DEBTOR AND CREDITOR—Change of relations.....	566
Right of party purchasing equity of redemption.....	566
DECEIT—Action for—Malice in.....	574
DECEIT AND FRAUD—When an action lies for.....	644
DECISIONS—Former in the same case— <i>Res adjudicata</i>	67
DECLARATION—Defective—Arrest of judgment.....	512
DECREES—Finding of service.....	71
Must be based upon the pleadings.....	321
Presumably correct.....	263
Presumptions in support of—Chancery practice.....	671
Unreversed—Former suit in bar.....	470
DEEDS—Ancient—Conveyances.....	132
Proof of ancient deeds.....	133
Reformation of—Conveyances—Mutual mistakes.....	671
DEFAULT—Change of possession on—Chattel mortgages.....	531
Possession taken on—In chattel mortgages—What is not sufficient.....	531
DEFENSES—On official bonds—Sureties.....	613
DESCRIPTION—Of premises—Real estate.....	
DESERTION—Willful—Cause of divorce.....	126
DILIGENCE—For the safety of passengers.....	303
DILIGENCE AND CARE—Miners at work.....	649
DIRECTOR—Of a corporation, contract with himself.....	552
Of a corporation—Preference by.....	249
DISMISSAL—Of bill for want of equity.....	470
DISOBEDIENCE—Of injunction upon the advice of counsel.....	467
DISSOLUTION—Of injunction—Damages.....	315
DIVORCE—Condonation.....	565
Foreign decree.....	71
Upheld by estoppel.....	263
Willful desertion.....	126
DRAFTS—What is an acceptance.....	163
DUTY—Of common carrier toward passengers.....	308
Question of—Negligence.....	325

E

ELECTION—Among alternative remedies.....	234
Irrevocable—Remedies.....	234
Among remedies—Inconsistent.....	234

EMPLOYEE—Evidence of reputation of—Negligence.....	512
Rights of—Master and servant.....	123
EMPLOYER—Duty of—Master and servant.....	123
EMPLOYMENT—Risk of—Application of the rule.....	544
Risk of—Master and servant.....	548
EQUITY—Courts of—Extent of jurisdiction.....	517
Dismissal of bill for want of.....	470
Foreclosure in—Chattel mortgages.....	516
Trial of title in—Real estate.....	538
EQUITY JURISDICTION—Violation of ordinances.....	314
When there is a remedy at law.....	376
EQUITY OF REDEMPTION—Right of party purchasing—Debtor and creditor.....	566
Rights of the owner.....	328
EQUITABLE INTEREST—Right to mortgage.....	284
ERROR—Assignment abandoned.....	323
Burden of showing.....	577
Intervening after jurisdiction attaches—Judgments.....	473
To be pointed out in appellate proceedings.....	323
ESTATES—Administration of—County court has original jurisdic- tion in.....	663
Limitations in wills, upon leases, etc., do not continue after the estate has passed from the trustees.....	167
ESTATE—Refusal to surrender—Arrest.....	222
ESTOPPEL—Divorce upheld by.....	263
Of bailee.....	630
EVIDENCE—Admissibility of written contracts.....	292
Bill of exceptions must show that it contains all.....	584
Certified copies—Admissibility.....	479
Facts within a person's knowledge.....	317
Identification of things referred to, by parol—Contracts.....	260
Instructions must be based upon the evidence.....	388
Irrelevant, properly excluded.....	269
Measure of proof.....	641
Of agency.....	634
Offer to make proof.....	479
Of reputation of employe—Negligence.....	512
Plea denying indorsement.....	373
<i>Prima facie</i> , of existing right—Burden of proof.....	317
Records of conviction of persons causing wrecks.....	608
Records of corporations.....	205
Rejection of—Care and diligence.....	215
Under the statute and at common law.....	215
Of Reputation—Competency of witnesses.....	512
EXCEPTIONS—Dismissal of bill.....	470
To administrator's report—Administration of estates.....	662
Bill of—Motion for a new trial.....	577

EXCEPTIONS. Continued.

Bill of, must be sealed.....	581
Bill of—Objections and exceptions—How shown.....	305
How preserved.....	179
Overruling, to administrator's report.....	662
To administrator's report—Practice.....	663
To master's report.....	295
To report of administrator—Character of—Administration of estates.....	662
When to be taken.....	289
EXCESSIVE DAMAGES.....	387
Assignment as error.....	323
In Appellate Court.....	76
\$1,500 is not when.....	572
\$10,000 is not when.....	544
\$5,000 is.....	308
EXECUTION—What matters subsequent to execution of mortgage need not be proved—Mortgages.....	295
EXECUTION SALES—Who may question them.....	473
EXEMPTION—Contracts of, from liability—Railroad companies.....	656
EXHIBITS—Must be preserved in the bill of exceptions.....	477
EXISTING RIGHTS—Prima facie evidence of—Burden of proof.....	317

F

FAILURE—To stop the car—Street railways.....	308
To stop when requested—Carriers of passengers.....	307
FALSE REPRESENTATION—Repetition of, not necessary.....	574
FELLOW-SERVANTS—Notice of defect in master.....	123
Rule of determination.....	512
Who are not.....	507
FINDINGS—Of juries—New trials on.....	649
Special—When not consistent with the general verdict.....	544
Of trial court, when conclusive—Fraud.....	190
FINDING OF SERVICE—In decree of divorce.....	71
FORCIBLE DETAINER—Appeal bond in five days.....	75
Lease for immoral purposes—Landlord and tenant.....	487
FORECLOSURE—In equity—Chattel mortgages.....	516
Of chattel mortgage—Courts of equity.....	516
Relations between the owner and purchaser.....	328
Purchaser takes with notice of taxes.....	329
Right of administrator to commissions in cases of.....	663
FOREIGN DECREE—Divorce.....	71
FORFEITURES—Burden of Proof.....	40
Waiver of.....	40
In courts of equity.....	132
Effect of unwarranted proceedings for—Stockholders.....	204

FORFEITURES. *Continued.*

In courts of equity.....	284
<i>Ipsa facto</i> under by-laws.....	78
Of substantial rights.....	79
Mutual aid associations.....	78
FORMS —Of judgment—Garnishment.....	302
Of verdict in abatement.....	377
FORMER SUIT PENDING —No bar.....	504
FRAUD —Attachment—Judgment <i>in rem</i>	17
Disposal of insurance policy to hinder or delay creditors.....	18
Finding of trial court, when conclusive.....	190
Fraudulent purpose inferred.....	574
FRAUDS —Statute of—Parol license to cut timber.....	621
FRAUD AND DECEIT —When the action lies.....	644
FRAUDULENT PURPOSE —Inferred—Fraud.....	574
FRAUDULENT SALES —Intervenors in attachment suits.....	579
Who may question.....	579
FRAUDULENT TRANSFERS —By whom impeached.....	636
FREEHOLD —Involved—Jurisdiction.....	473
When not involved.....	478
FREIGHTING CONTRACT —Waiver of conditions in.....	656
FREIGHT TARIFFS —Railroad company's right to make—Agent's construction.....	151

G

GARNISHEE PROCEEDINGS —The issue, how made.....	302
GARNISHMENT —The term defined.....	281
How affected by assignments.....	281
How affected by assignment of the fund.....	281
Form of the judgment.....	302
Rent to accrue—Equitable assignment.....	240
GUARANTOR —When not liable.....	612
GUARANTY —Implied promises.....	69
GUARDIAN —Suits by, or next friend—Infants.....	491

H

HANDWRITING —Proof by comparison.....	295
HEIRS —Commissions on the moneys in the hands of—Administrators.....	663
HUSBAND —Not competent as witness—When.....	387

I

IMPLIED PROMISES —Guaranty.....	69
INCUMBRANCE —Inchoate right of dower—Damages.....	186
Right of recovery upon removal of.....	186

INDORSEMENT—On a note—Presumptions—Payments.....	373
Plea denying—Evidence.....	373
INFANTS—Bound by the acts of next friend.....	492
Knowledge of the suit not necessary.....	491
Negligence of.....	121
Suits by at common law.....	491
Suits by guardian or next friend.....	491
Suits by next friend—Presumptions.....	492
Suits by—Practice.....	491
INJUNCTION—Damages on dissolution.....	315
Dissolution—Damages—Services of solicitor.....	315
Dissolution damages—Solicitor's fees—Agreement.....	315
Disobeying by advice of counsel.....	467
Object of interlocutory, etc.....	129
Appropriate functions—Preventive relief.....	129
What is, etc.—Assessment of damages.....	483
INSOLVENCY—Corporations—Relation of directors to creditors..	249
INSOLVENT ESTATES—Priority of lien, etc.....	115
Right of the debtor to purchase his own debt.....	32
INSTRUCTIONS—Cities and villages—Sidewalks.....	595
Conflict of testimony.....	488
Exceptions to.....	373
Lost—Appellate Court practice.....	325
May be given orally, when.....	292
Must be contained in the abstract.....	597
Must be based upon the evidence.....	388
Must be in writing.....	305, 373
Not to be misleading.....	542
Province of the jury.....	351
Relieving the plaintiff of the burden of proof.....	380
Should be accurately drawn.....	377
Singling out testimony.....	488
INSTRUMENTS—Construing ambiguous written instruments....	351
Creating trusts, construction of.....	166
INSURANCE—Beneficiaries in policies—Vested rights.....	18
Right to change the beneficiary.....	18
Assignment of policy—Reservation.....	18
Power to assign policy with limitations.....	18
Policy a chose in action.....	18
In whose name suit to be brought.....	252
Statement as to ownership of property insured.....	252
Acceptance of premium—Estoppel.....	252
Insurable interest.....	253
Contributing insurance.....	253
Organizations not for pecuniary profit—Policies not commercial.....	17
Associations for mutual benefit, not for gain—Construction of statutes.....	17

INSURANCE. <i>Continued.</i>	
Contract—Naming the beneficiary.....	17
Provisions in the policy relating to title, etc.....	479
Forfeiture of policies—Notice.....	40
INTEREST —Insurable—Insurance.....	253
Unreasonable and vexatious delay of payment.....	226
INTERPLEADER —Effect on the original parties.....	138
Questions at issue—Burden of proof.....	579
INTERPRETATION —Of contract.....	587
Of doubts in contracts.....	391
INTER-STATE COMMERCE —Falsely described goods.....	151
INTERVENORS —In attachment suits—Fraudulent sales.....	579
IRREGULARITIES —Time to object—Practice.....	549
ISSUE —How made in garnishment proceedings.....	302

J

JOINT LIABILITY —Plea denying.....	175
JUDGES —The jury are, of the testimony.....	380
JUDGMENTS —Arrest of—Defective declaration.....	512
Collateral attack.....	473
Collateral attack—Fraud.....	491
Collateral attacks—Upon what based.....	491
Entered in term time—Presumption.....	566
Errors intervening after jurisdiction attaches.....	473
Form of—In garnishment.....	302
How they may be attacked.....	491
Notice as to, other States.....	71
Who may attack collaterally.....	473
JUDGMENT CREDITORS —Preferences—Assignment for the benefit of creditors.....	587
JURIES —Findings of—New trials.....	649
JURISDICTION —Courts of equity will retain—When.....	588
Errors intervening after jurisdiction attaches.....	473
Extent of, of courts of equity.....	517
Freehold involved.....	473
In chancery—To adjust the whole controversy.....	683
Of State courts in patent cases.....	603
JURY —Instructions to.....	351
Judges of the testimony, etc.....	380
Power of—Review—Damages.....	308
JUSTICES' COURTS —Misjoinder of parties.....	100

L

LABORER OR SERVANT —Who is not.....	233
LANDLORD AND TENANT —Lease for immoral purposes—Forcible detainer.....	487

LAW COURTS—Relief from penalties in—Contracts.....	390
LEASE—Assignment—Transfer of an equitable right to rent.....	240
For immoral purposes—Forcible detainer—Landlord and tenant.....	487
By an officer of a corporation with himself.....	553
LEGISLATION—Effect of on streets.....	353
LETTERS—Admissions in.....	351
LIABILITY—Exemption from, contracts of—Railroad companies.....	656
Right to contract against—Common carriers.....	656
LICENSE—Parol, to cut timber—Statute of frauds.....	621
LIENS—Assignee for the benefit of creditors, takes subject to all.....	587
Priority of—Insolvent estates.....	115
LIMITATIONS.....	211
By bill of particulars.....	146
LIMITATION—County orders.....	191
LIQUIDATED DAMAGES—Contracts.....	390
Penalties.....	354
LUNATICS—Criminal responsibility.....	200
Civil responsibility.....	200
Responsibility—Public policy.....	200
Torts committed by.....	200

M

MALICE—In action for deceit.....	574
MASTER—Duty of—Negligence.....	121
MASTER AND SERVANT—Duty of employer.....	123
Rights of employe.....	123
Risk of the employment.....	543
MASTER IN CHANCERY—Duty when a cause is referred.....	295
MASTER'S REPORT—Exceptions to, etc.....	295
Objection to—Chancery practice.....	538
MATERIALS—Merchants furnishing—Mechanic's lien.....	58
MECHANIC'S LIEN—Construction of the statute.....	270
Effect of assignments for the benefit of creditors upon.....	270
Merchants furnishing materials.....	58
Statement under section 4.....	58
A statutory remedy.....	60
Personal decrees.....	321
MINERS—At work—Care and diligence.....	649
MISJOINDER OF PARTIES—Pleadings.....	100
Justices' courts.....	100
MISLEADING—Instructions not to be.....	542
MISTAKES—Principal liable for mistakes of agent.....	615
MORTGAGES—Right to mortgage equitable interest.....	284
Chattel—Days of grace.....	530
What matters subsequent to the execution need not be proved.....	295

MOTION—For a new trial—Bill of exceptions.....	577
MOTION—Requisites of, what must be pointed out.....	634
When abandoned.....	328
MOTION TO DISMISS—On failure to file briefs and abstracts in time.....	75
MUTUAL AID ASSOCIATIONS—Forfeitures.....	78
Rights of member—Corporation.....	78
Forfeiture— <i>Ipsa facto</i> under by-laws.....	78
<i>Ipsa facto</i> , forfeiting clauses.....	78
Notice of assessment.....	78
Substitution for actual notice.....	78
Manner of giving notice of assessment.....	79
MUTUAL BENEFIT ASSOCIATIONS—Insurance—Construction of statute.....	17
Service of notice of assessments.....	79
Remittances in time.....	79
Can not keep a member's money and insist that his member- ship is lost.....	79
MUTUAL MISTAKES—Conveyances—Reformation of deeds.....	671

N

NAMES—Of places—Trade names.....	281
Parties litigant to sue in their right names.....	399
NEGLIGENCE—Breach of duty—Street railways.....	308
NEGLIGENCE—Bumping cars.....	507
Comparative—Ordinary care.....	626
Due care.....	334
Evidence of reputation of employe.....	512
Exercise of ordinary care.....	593
Must be shown or there can be no recovery.....	607
Of infants.....	121
Duty of master.....	121
Omission to look for trains.....	597
Ordinary care.....	247
Question of duty.....	325
NEGLIGENT ACT—Death from—Damages.....	334
NEW TRIAL—Motion for—What must be pointed out.....	634
On findings of juries.....	649
NEXT FRIEND—Infant bound by the acts of.....	492
Suits by—Infants—Presumptions.....	492
Suits by, or guardian—Infant.....	491
NON-ASSUMPSIT— <i>Non est factum</i> at common law—Pleading..	553
Verified—Pleading.....	553
NON EST FACTUM— <i>Non-assumpsit</i> at common law—Pleading..	553
NOTES—Chattel mortgages void when securing notes maturing not within two years.....	530

NOTE—Indorsements on—Presumptions—Payments.....	373
Days of grace.....	530
NOTICE—As to laws of other States.....	71
Of assessment—Mutual benefit associations.....	78
Of application for appointment—Receiver.....	517
Of contract of insurance.....	18
Of defects—Fellow-servants.....	123
Of forfeiture of insurance policy.....	40
Once in court—Presumptions.....	103
Once in court, always in court.....	103
Purchaser takes with notice of taxes—Foreclosure.....	329
Substitution for active notice.....	78
Manner of giving, of assessment.....	79
To attorneys, when to clients.....	337
To bring suit—Surety—To whom the law does not apply.....	566
NOTICE BY MAIL—What is “the day of notice”.....	40

O

OBJECTIONS—And exceptions—How shown—Bill of exceptions..	305
To master's report—Chancery practice.....	538
To record—On rehearing.....	399
OBLIGATION—To use care, can not be delegated ...	124
OFFICERS—Contracts between, and corporations.....	553
OFFICIAL BONDS—Defenses on—Sureties.....	613
OMISSION—To look for trains—Negligence.....	597
OPTION CONTRACTS—Right to fix the penalty of a bond.....	90
What is, and what is not.....	384
ORDER—Approving administrator's report—Appeal from.....	663
ORDER OF COMMITTAL—For contempt of court.....	100
ORDER OF COURT—Certainty as to requirements—Contempt....	103
ORDINANCES—Violation of—Equity jurisdiction.....	314
ORDINARY CARE—The term defined.....	626
ORIGINAL JURISDICTION—County Court in the administration of estates.....	663
ORIGINAL PARTIES—Effect of an interpleader on.....	133
OWNER—Relations between, and purchaser—In foreclosure.....	328

P

PARTIES—Consignor and consignee.....	151
Promissory notes—Maker and guarantor.....	100
Rights of persons not made parties.....	517
Right of party purchasing equity of redemption—Debtor and creditor.....	566
Suit for the use of another.....	485
To sue in their right names.....	399

PARTNERSHIP—Admissions of members, etc.—Effect of.....	289
<i>Res adjudicata</i>	291
PATENTS—Jurisdiction of State courts.....	608
PAUPERS—Support of by relatives.....	688
PAYMENT—Burden of proof.....	641
Indorsement on a note—Presumptions.....	878
Implication from, of rent—Tenancies—From month to month.....	272
Of taxes by owner—Presumption of.....	182
Priority of—Assignment for the benefit of creditors.....	115
Unreasonable and vexatious delay of—Interest.....	236
Who liable for—Taxes.....	328
PENALTIES—For non-performance of contract.....	891
Liquidated damages.....	854
Relief from, in law courts—Contracts.....	890
Suit to enforce—What is not.....	204
PERSONAL DECREES—Mechanics' liens.....	821
PLEADING—Allegations of ownership.....	57
Amendments, how made.....	499
And proof—Variance—Explanation of terms used.....	151
Decrees must be based upon.....	321
Misjoinder of parties.....	100
<i>Non-assumpsit</i> verified.....	583
<i>Non est factum</i> and <i>non-assumpsit</i> at common law.....	558
PLEAS—Denying indorsement—Evidence.....	373
Denying joint liability.....	175
Filing additional—Practice.....	482
Imposing terms on withdrawal.....	175
POLICY OF INSURANCE—Of insurance, not commercial—Organ-	
izations not for pecuniary profit.....	17
Disposal of to hinder creditors is fraud.....	18
Forfeiture of—Notice.....	40
POSSESSION—Change of—Chattel mortgages.....	531
Holding without a title—Extent of possession.....	620
Taken on default—Chattel mortgages—What is not sufficient..	531
POWERS—Of county judge to fix administrator's commissions...	663
To declare entire debt due—Chattel mortgages.....	531
PRACTICE—Exceptions to administrator's report.....	663
Chancery—Presumptions in support of decrees.....	671
Filing additional pleas.....	482
Mere irregularities—Time to object.....	549
On appeal from a final order approving administrator's report	663
Short cause calendar.....	387
Short cause calendar—Waiver of irregularities.....	549
Suits by infants.....	491
In Appellate Court—Appeal to Supreme Court—Striking out re-	
manding order.....	74
Presumption that the trial court was right.....	479

PRÆCIPLE AND DECLARATION—Variance.....	572
PREMISES—Description of—Real estate.....	504
In possession of a receiver.....	328
PREFERENCES—By directors of an incorporated company.....	249
Judgment creditors—Assignment for the benefit of creditors..	587
PRESUMPTIONS—In support of decrees—Chancery practice.....	671
From absence of record.....	301
Indorsement on a note—Payments.....	373
Infants—Suits by next friend.....	492
Judgment entered in term time.....	566
Of death.....	317
That the trial court was right—Practice in Appellate Court....	479
PREVENTIVE RELIEF—Injunctions—Appropriate functions....	129
PRINCIPAL—Liable for mistakes of agent—Mistakes.....	615
Real estate broker's duty to.....	243
Charges and expenses—Assignee.....	115
PROMISSORY NOTES—Control of indorsements.....	399
Days of grace.....	530
Parties—Maker and guarantor.....	100
Recovery under the common counts.....	378
Holder's right to recover.....	373
PROPERTY—Director—Stockholder's right to purchase.....	31
Withdrawing claims against assets in the hands of the assignee	31
Fraudulent disposal of.....	17
Listing—Revenue.....	640
Opportunity to inspect—Sales.....	226
No opportunity to inspect.....	226
Rights of owners of, fronting on streets.....	353
PROPERTY OWNERS—Expediency of giving power to—Streets.	353
Consent—Compensation—Streets.....	354
PROOF—And pleading—Variance—Explanation of terms used....	151
Burden of—Payment.....	641
Burden of—Questions at issue—Interpleader.....	579
By comparison—Handwriting.....	295
Measure of—Evidence.....	641
Of ancient documents.....	182
Offer to make—Evidence.....	479
What matters need not be proved subsequent to execution of mortgage.....	295
PUBLIC INTERESTS—In streets.....	353
PUBLIC POLICY—Contract for the withdrawal of opposition to legislation.....	354
Contracts otherwise void, etc.....	354
Contracts for carrying out legislation.....	354
Responsibility—Lunatics.....	200
PURCHASER—No reimbursement for—Period of redemption— Taxes.....	323

PURCHASER. *Continued.*

Relations between, and owner—Foreclosure proceedings.....	328
Takes with notice of taxes—Foreclosure proceedings.....	329

Q

QUESTIONS AT ISSUE—Interpleader—Burden of proof.....	579
--	-----

R

RAILROAD COMPANIES —Actions against for damages to real property.....	498
Not liable for criminal acts of others.....	607
Speed of trains.....	597
Contracts of exemption from liability.....	656
Right to make freight tariffs—Agent's construction.....	151
Right to obstruct public street.....	384
RAILROAD CROSSINGS —Care in approaching.....	597
RATIFICATION —By corporations need not be in writing.....	538
Void and voidable contracts.....	553
REAL ESTATE —Description of premises.....	504
Trespass to—Right of action in the owner of the fee.....	620
Trial of title in equity.....	538
Actions against railroads for damages to.....	498
REAL ESTATE AGENT —When entitled to his commission, 243, 267, 622	
When not entitled to his commission.....	622
Time to sell—End of authority.....	243
Duty to his principal.....	243
RECEIVER —Effect of appointment.....	517
Appointment of, a peremptory measure.....	517
In possession of mortgaged premises.....	328
Notice of application for appointment.....	517
Premises in possession of—Redemption.....	328
Purpose of his appointment.....	517
What must appear to warrant the appointment.....	517
RECORD —Absence of—Presumptions.....	301
Bill of particulars not a part of.....	146
Bills of exceptions.....	371
Not to be made by the clerk.....	371
Of conviction of persons causing wrecks—Evidence.....	606
Of corporations—Evidence.....	205
Stipulation as to bill of exceptions.....	282, 289, 482
RECOUPMENT —Elements of the doctrine.....	226
Partial acceptance of order—Vendor and vendee.....	47
Under the general issue.....	48
RECOVERY —Holder's right to—Promissory notes.....	373
Misjoinder.....	100
Negligence must be shown or there can be no.....	607

RECOVERY. <i>Continued.</i>	
Right of—Of incumbrance upon removal.....	186
Under the common counts—Promissory notes.....	373
REDEMPTION—Equity of—Rights of the owner.....	328
Premises in possession of a receiver.....	328
REFORMATION—Of deeds—Mutual mistakes—Conveyances.....	671
REHEARING—Objection to record <i>in</i>.....	399
REIMBURSEMENT—None for purchaser paying taxes—Period of redemption.....	328
RELATIVES—Support of paupers by.....	683
REMEDY—At law—When there is.....	379
Contracts—Validity—Law of the place.....	204
REMEDIES—Election among alternative remedies.....	234
Irrevocable election.....	234
Election among inconsistent.....	234
Election among—The general rule.....	235
Personal action suspended.....	235
RENT—To accrue—Equitable assignment—Garnishment.....	240
REPETITION—Of false representation not necessary.....	574
REPLEVIN—And trespass—Concurrent remedies.....	235
REPLICATION—No replication filed—Chancery practice.....	538
REPORT—Appeal from an order approving administrators.....	662
Character of exceptions to administrator's report.....	662
Exception to administrator's—Administration of estates.....	662
Overruling exceptions to administrator's.....	662
REPRESENTATIONS—False—Repetition of, not necessary.....	574
REPUTATION—Evidence of, of employe—Negligence.....	512
REQUISITES—Of motion for a new trial—What must be pointed out.....	634
RES ADJUDICATA—Former decisions in the same case.....	67
Partnership affairs.....	291
Where the doctrine does not apply.....	617
RETAINER—Attorneys at law.....	549
REVENGE—Listing property.....	640
RIGHT—Of action in the owner of the fee—Trespass to real estate.....	620
To commissions in cases of foreclosure—Administrators.....	663
To contract against liability—Common carriers.....	656
RIGHTS—Of the owner in equity of redemption.....	328
Of party purchasing equity of redemption.....	566
Of persons not made parties—Parties.....	517
RIGHT OF DOWER—Inchoate—Contracts for conveyances.....	186
RISK—Of the employment—Master and servant.....	543
Application of the rule.....	544

S

SALES—Execution—Who may question them.....	473
Fraudulent—Intervenors in attachment suits.....	579

SALES. *Continued.*

Fraudulent—Who may question.....	579
Opportunity to inspect the property.....	226
No opportunity for inspection.....	226
Acceptance after an opportunity to inspect.....	226
SERVANT—Who is not.....	233
Who is not a fellow-servant.....	507
SERVICE—Of notice of assessment.....	79
Of process—Construction of statutes.....	339
Read to wrong person, but in presence of the right.....	377
SERVICES—Of solicitor—Injunction—Dissolution—Damages.....	315
SHORT CAUSE CALENDAR—Discretion of the court.....	274
Practice.....	337
Practice—Waiver of irregularities.....	549
SHERIFF—Return on property executed—Body execution—Arrest.....	223
SIDEWALKS—Instructions—Cities and villages.....	595
SOLICITOR—Services of—Injunction—Damages—Dissolution.....	315
SOLICITOR'S FEES—Injunction—Dissolution of damages—Agreement.....	315
SPECIAL DEPOSITS—Trust funds—Voluntary assignments.....	180
SPECIAL FINDINGS—When not consistent with the general verdict.....	544
SPECIFIC PERFORMANCE—Requisites of the contract.....	90
Contracts not susceptible of.....	91
SPHERE OF ACTION—Power of street railroad company to limit.....	355
STATE COURTS—Jurisdiction in patent cases.....	603
STATEMENT—As to ownership of property insured.....	252
STATUTES—Construction of—Insurance—Mutual benefit associations.....	17
Construction of—Mechanics' liens.....	270
Construction of—Service of process.....	339
Evidence under and at common law.....	215
STATUTE OF FRAUDS—Parol license to cut timber.....	621
STATUTORY REMEDY—Mechanics' lien.....	60
STIPULATION—As to bill of exceptions.....	382
As to bill of exceptions—Record.....	289, 482
STIPULATED DAMAGES—Contracts.....	391
STOCKHOLDERS—Effect of unwarranted proceedings for forfeiture.....	204
Status after a forfeiture of his stock.....	204
Buying shares—Contracts with reference to by-laws.....	204
May become creditors.....	31
Director—Stockholder's right to purchase property, etc.....	31
Rights of stockholder's creditors.....	31
Creditors withdrawing their claims against the assets in the hands of the assignee.....	31

STOCKHOLDERS. Continued.

Presumed to have knowledge of the company's by-laws.....	204
Relation to the corporation after failure.....	32
Liability in insolvent corporations.....	33
STOCKHOLDER CREDITOR—Purchase of certificates of indebtedness	32
STOCKHOLDER'S LIABILITY—Voluntary payment of the creditor.....	32
STREETS—Control over—Cities and villages.....	128
Vacating or obstructing—Special damage.....	128
Railroad's right to obstruct—Railroad company.....	334
Effect of legislation.....	353
Trust vested in the city with respect to their use.....	353
Right of owners of property fronting on same.....	353
Adjacent owners—Character in which they hold.....	353
Expediency of giving power to property owners.....	353
Adjacent property owner—Consent—Compensation.....	354
Public interests in.....	353
Rights of abutting owner.....	129
Tendency of the consent of adjacent owners.....	354
STREETS OF A CITY—For public use.....	353
STREET RAILWAYS—Failure to stop the car.....	308
Negligence—Breach of duty.....	308
Diligence for the safety of passengers.....	308
STREET RAILROAD COMPANIES—Corporate charter.....	354
Powers to limit its sphere of action.....	355
SUPPORT—Of paupers by relatives.....	683
SUITS—By infants at common law.....	491
By next friend—Presumptions—Infants.....	492
For the use of another—Parties.....	485
Notice to bring—Surety—To whom the law does not apply....	566
To enforce penalties—What is not.....	204
In whose name to be brought—Insurance.....	252
SURETIES—Defenses on official bonds.....	613
On appeal bond—When released.....	485
SURETY—Notice to bring suit—To whom the law does not apply.	566

T

TAXES—Presumptions of payment by owner.....	132
Receiver in possession of mortgaged premises.....	328
Who liable for their payment.....	328
Period of redemption—No reimbursements—For purchaser...	328
TENANCIES—From month to month—Implication from payment of rent.....	273
TENDER OF A DEED—When unnecessary.....	133
TERM—Amendment of bill of exceptions after term is over.....	584

TERM TIME—Judgment entered in—Presumptions.....	566
TESTIMONY—Conflict of—Instructions.....	488
Jury are judges of the testimony.....	380
Singling out—Instructions.....	488
TIMBER—Parol license to cut—Statute of frauds.....	621
TITLE—Holding without—Possession—Extent of Possession.....	620
Provisions in policy of insurance relating to—Insurance.....	479
To unpaid checks—Assignment for the benefit of creditors....	349
Trial of in equity—Real estate.....	588
TORTS—Committed by a lunatic.....	200
TRADE NAMES—Names of places, etc.....	231
TRAINS—Omission to look for—Negligence—Speed of—Railroads.	597
TRANSFERS—Fraudulent—By whom impeached.....	636
TRESPASS—And replevin—Concurrent remedies.....	235
TRESPASS TO REAL ESTATE—Right of action in the owner of the fee.....	620
TRIALS—Appeals from justices—When properly for trial.....	387
Motion for a new—Bill of exceptions.....	577
Motion for a new—What must be pointed out.....	634
New—On findings of juries.....	634
Of title in equity—Real estate.....	588
TRIAL COURT—Presumption that it was right—Appellate Court practice.....	479
TRUSTEE—Can not shift his burden on a court of equity.....	517
When he may apply to a court of equity, etc.....	517
TRUSTS—Construction of instruments creating.....	166
Public interests.....	167
TRUST—Vested in the city in respect to the use of streets.....	353
TRUST FUNDS—Special deposits in—Voluntary assignments....	180

U

UNAUTHORIZED ORDER—Disobedience of—Contempt of court.	52
UNREASONABLE PROVISIONS—Result of in by-laws.....	204
UNREVERSED DECREE—Former suit in bar.....	470
USURY—Note made in a foreign State.....	873

V

VARIANCE—Pleading and proof—Explanations of terms used...	151
Præcipe and declaration.....	572
VENDOR AND VENDEE—Partial acceptance of order—Recoup- ment.....	47
VERDICT—Form of an abatement.....	377
When special findings are not consistent with the general....	544
VERDICT AND JUDGMENT—Conclusion of law, etc.....	203

VIOLATION—Of ordinances—Equity jurisdiction.....	814
VOID AND VOIDABLE CONTRACTS—Ratification.....	553
VOID ORDER—Contempt of court.....	51
VOLUNTARY ASSIGNMENTS—Trust funds—Special deposits...	180
VOLUNTARY PAYMENT—Of the creditor.....	32
Of debts by stockholder.....	32

W

WAIVER—Appeal—People cases.....	112
Of conditions in freighting contract.....	656
Of forfeiture of insurance policy.....	40
Of irregularities—Practice—Short cause calendar.....	549
Of provisions of a contract by an attorney.....	133
Of the right to have cause heard upon bill and answer.....	538
WILLS—Limitations in—Do not continue after the estate has passed from the trustees.....	167
WITNESSES—Competency, how shown.....	582
Evidence of reputation—Competency of.....	512
WITNESS—Husband not competent—When..	387
WRIT OF RIGHT— <i>Capias ad satisfaciendum</i> is not—Arrest.....	222
WRITING—Construing ambiguous—Written instruments.....	351
Instructions must be in writing.....	305, 373
Ratification by corporation need not be in.....	553
WRITTEN INSTRUMENTS—Construing an ambiguous writing..	351

11

HARVARD

